(25,082)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 799.

THE MISSOURI PACIFIC RAILWAY COMPANY, PLAINTIFF IN ERROR,

vs.

THE STATE OF KANSAS.

IN ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

INDEX.

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., APRIL 12, 1916.

1 In the Supreme Court of the State of Kansas.

No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY CO., Appellant.

Be it remembered, that on the 12th day of February 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, a certified copy of the Notice of appeal and the proof of service thereof and of the Journal Entry of judgment complained of, in the above entitled case, which notice of appeal and Journal entry of judgment are in the words and figures, as follows, to-wit:—

2 In the District Court of Cherokee County, Kansas, Sitting at Columbus.

No. 19984.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Notice of Appeal.

The Missouri Pacific Railway Company, Defendant, to the State of Kansas; O. W. Fail, Clerk of the 11th Judicial District Court of the State of Kansas, and F. W. Boss, County Attorney of Cherokee County, Kansas, Greeting:

You, and all of you will take notice hereby that the defendant, The Missouri Pacific Railway Company intends to and does hereby appeal from the judgment rendered by the Court in said case against it.

THE MISSOURI PACIFIC RAILWAY COMPANY, *Defendant,*
By W. P. WAGGONER,
J. M. CHALLIS,
AL F. WILLIAMS,
Attorneys.

STATE OF KANSAS,
Cherokee County, ss:

Al F. Williams, of lawful age, being first duly sworn upon his oath states; that he is one of the attorneys of record for defendant

in case of The State of Kansas versus The Missouri Pacific Railway Company; that on March 20, 1915, this affiant served the above notice of appeal upon O. W. Fail, Clerk of the District Court of Cherokee County, Kansas, and upon F. W. Boss, County attorney of Cherokee County, Kansas, by delivering to each of said persons at their respective offices in the Court House in Columbus, Cherokee County, Kansas, a full, true, complete and correct copy of the said above Notice of Appeal.

AL F. WILLIAMS.

Subscribed and sworn to before me this 20th day of March, A. D. 1915.

[SEAL.] LOLA M. WILLIAMS,
Notary Public.

My Commission expires September 29th, 1918.

Filed March 20, 1915. O. W. Fail, Clerk District Court.

3 STATE OF KANSAS,
Cherokee County, ss:

I, O. W. Fail, Clerk of the District Court within and for the above named county and state, do hereby certify that the above and foregoing is a true, full, complete and correct copy of the Notice of Appeal and Proof of service thereof in the above entitled action as the same remains of file at my office in Columbus, Cherokee County, Kansas.

Witness my hand and the official seal of said Court affixed in the City of Columbus, Kansas, this 22" day of March, A. D. 1915.

[SEAL.] O. W. FAIL,
Clerk District Court,
By FRED SIMSIN, *Deputy.*

Endorsed: 19984. The State of Kansas, Appellee, vs. The Mo. Pac. Ry. Co., Appellant. Certified copy of Notice of Appeal & Proof of Service. Filed Mar. 23, 1915. D. A. Valentine, Clerk Supreme Court.

4 Filed Apr. 12, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

Appealed from the District Court of Cherokee County, Kansas.
Hon. E. E. Sapp, Judge.

ABSTRACT OF THE STATE UPON ITS APPEAL.

S. M. Brewster, Attorney-General;
F. W. Boss, County Attorney, for the State of Kansas.

5 In the Supreme Court of the State of Kansas.

No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

APPELLEE'S ABSTRACT ON RESERVED QUESTIONS.

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Plaintiff's Assignment of Errors.

The plaintiff in the above-entitled action complains of errors committed in the rulings, orders and decisions of the district court in the trial of said cause in the district court of Cherokee county, Kansas, sitting at Columbus, on the 11th and 12th days of December, 1914, the same being at the October 1914 term of said court, and also of error committed by said court in the ruling, order and decision made on the 9th day of January, 1915, at the January 1915 term of said court, sitting at Columbus, to which rulings, orders and decisions timely objections and exceptions were duly taken and saved by said plaintiff, and questions reserved thereon for the purpose of appeal to the supreme court. A transcript of the record of said pro-

ceedings had in the said cause, duly certified to, is attached to and filed herewith and made a part hereof, and said plaintiff alleges that there is error in said record and proceedings in this, to wit:

First. Said district court in the trial of said cause erred in
6 sustaining the defendant's objection to the introduction of testimony under the thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth, and twenty-fifth counts of the amended information filed in said cause.

Second. Said district court in the trial of said cause erred in excluding evidence offered by the plaintiff, and particularly the certified copy of the record of the United States internal revenue office, showing John Comba and James Depoli for the year from July, 1912, to July, 1913, held internal revenue licenses as wholesale malt liquor dealers.

Third. Said district court erred in sustaining defendant's motion to retax costs and ordering that the attorney fee of twenty-five ($25.00) dollars on each count on which defendant was convicted should not be taxed as costs in said action.

Wherefore, Plaintiff prays that the rulings, orders and decisions herein complained of be reversed and set aside.

F. W. BOSS,
County Attorney of Cherokee County, Kansas, for Plaintiff.

(Record, Pages 1 and 2.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Amended Information.

First Count.

I, F. W. Boss, county attorney in and for the county of Cherokee, and state of Kansas, in the name, by the authority and on behalf of the state of Kansas, for the first count of this information against said defendant, The Missouri Pacific Railway Company, a corporation, do come now here and give the court to understand and be informed, and do give the court information: That the said defendant, The Missouri Pacific Railway Company, is a corporation duly organized and existing as such and doing business as a railroad company and common carrier, and that the said defendant, The Missouri Pacific Railway Company, as aforsaid at the county of Cherokee, and the state of Kansas, on the 3d day of June, 1913, did then and there unlawfully carry from without the state of Kansas, to within and into

the state of Kansas, intoxicating liquors, to wit, 30,000 pounds of beer, a more particular description of which your informant does not know and therefore can not state, for the purpose of delivering the said intoxicating liquors to another, to wit, one John Comba, he, the
7 said John Comba, being then and there interested in said intoxicating liquors as consignee thereof, the said purposed and intended delivery of said intoxicating liquors to said John Comba as aforesaid, not being for a lawful purpose, but the said liquors being then and there intended by said John Comba, to be used in violation of the prohibitory liquor law of the state of Kansas, and said defendant, The Missouri Pacific Railway Company, then and there well knowing that said purposed and intended delivery as aforesaid was not for a lawful purpose, but was for the unlawful purpose aforesaid; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Kansas.

The amended information contained twenty-five counts of which the foregoing is the first count. Counts numbered from two to twelve, inclusive, are in the same form as the first count, and are therefore not written out in full in this abstract; each charges the defendant with bringing intoxicating liquor into this state for an unlawful purpose, the dates, quantity of liquor transported and persons to whom shipped being charged in the several counts, respectively, as follows:

Number of counts.	Date.	Quantity of beer.	Consignee.
Second	June 7, 1913,	13,200 pounds,	John Comba.
Third	June 5, 1913,	10,000 pounds,	John Comba.
Fourth	May 26, 1913,	30,500 pounds,	John Comba.
Fifth	May 30, 1913,	30,800 pounds,	John Comba.
Sixth	June 2, 1913,	16,760 pounds,	J. Depoli.
Seventh	June 10, 1913,	17,100 pounds,	J. Depoli.
Eighth	June 11, 1913,	17,150 pounds,	J. Depoli.
Ninth	June 13, 1913,	14,340 pounds,	J. Depoli.
Tenth	May 26, 1913,	16,710 pounds,	J. Depoli.
Eleventh	May 30, 1913,	11,200 pounds,	J. Depoli.
Twelfth	May 31, 1913,	18,700 pounds,	J. Depoli.

Thirteenth Count.

I, F. W. Boss, county attorney as aforesaid, in the name, by the authority and on behalf of the state of Kansas, for a further and thirteenth count of this information against said defendant, give the court to understand and be informed, that said defendant, The Missouri Pacific Railway Company, is a corporation duly organized and existing as such and doing business as a railroad company and common carrier, and that the said defendant, The Missouri Pacific Railway Company, as aforesaid, at the county of Cherokee, and the state of Kansas, on the 3d day of June, 1913, did then and there unlawfully deliver to one John Comba, certain intoxicating liquors, to wit, 30,000 pounds of beer, said delivery not being for a lawful purpose, and said intoxicating liquors not being intended for use by

the said John Comba for a lawful purpose, but the said liquors being then and there intended by the said John Comba to be used in violation of the prohibitory liquor law of the state of Kansas, all
8 of which said defendant, The Missouri Pacific Railway Company, then and there well knew; contrary to the form of the statute in such cases made and provided and against the peace and dignity of the state of Kansas.

Counts numbered from fourteen to twenty-four, inclusive, are in the same form as the thirteenth count, and each charges defendant with delivering intoxicating liquor to be used for an unlawful purpose, the dates, quantity of liquor delivered and persons to whom delivered being charged in said several counts, respectively, as follows:

Number of counts.	Date.	Quantity of beer.	To whom delivered.
Fourteenth ...	June 7, 1913,	13,200 pounds,	John Comba.
Fifteenth	June 5, 1913,	10,000 pounds,	John Comba.
Sixteenth	May 26, 1913,	30,500 pounds,	John Comba.
Seventeenth ..	May 30, 1913,	30,800 pounds,	John Comba.
Eighteenth ...	June 2, 1913,	16,760 pounds,	J. Depoli.
Nineteenth ...	June 10, 1913,	17,100 pounds,	J. Depoli.
Twentieth	June 11, 1913,	17,150 pounds,	J. Depoli.
Twenty-first ..	June 13, 1913,	14,340 pounds,	J. Depoli.
Twenty-second.	May 26, 1913,	16,710 pounds,	J. Depoli.
Twenty-third .	May 30, 1913,	11,200 pounds,	J. Depoli.
Twenty-fourth.	May 31, 1913,	18,700 pounds,	J. Depoli.

Twenty-fifth Count.

I, F. W. Boss, county attorney in and for the county of Cherokee, state of Kansas, in the name, by the authority and on behalf of the state of Kansas, for a further and twenty-fifth count of this information against said defendant, The Missouri Pacific Railway Company, a corporation, do come now here and give the court to understand and be informed, and do give the court information: That said defendant, The Missouri Pacific Railway Company, is a corporation duly organized and existing as such, and doing business as a railroad company and common carrier, and that the said defendant, The Missouri Pacific Railway Company, at the county of Cherokee, and state of Kansas, on the 2d day of June, 1913, did then and there unlawfully carry from without the state of Kansas, to within and into the state of Kansas, intoxicating liquors, to wit, 9960 pounds of beer, a more particular description of which your informant does not know and therefore can not state, for the purpose of delivering the said intoxicating liquors to another, to wit, J. Depoli, he, the said J. Depoli, being then and there interested in said intoxicating liquors as consignee thereof, the said purposed and intended delivery of the said intoxicating liquors to said J. Depoli as aforesaid, not being for a lawful purpose, but the said liquors being then and there intended by said J. Depoli to be used in violation of the prohibitory

liquor law of the state of Kansas, all of which the said defendant, The Missouri Pacific Railway Company, then and there well knew,
and the said defendant, The Missouri Pacific Railway Com-
9 pany did then and there unlawfully deliver the said intoxicating liquors to the said J. Depoli, the said delivery not being for a lawful purpose, and the said intoxicating liquors not being intended for use by the said J. Depoli for a lawful purpose, but the said liquors being then and there intended by the said J. Depoli to be used in violation of the prohibitory liquor law of the state of Kansas, all of which said defendant, The Missouri Pacific Railway Company, then and there well knew; contrary to the form of the statutes in such cases made and provided and against the peace and dignity of the state of Kansas.

F. W. BOSS,
County Attorney of Cherokee County, Kansas.

STATE OF KANSAS,
Cherokee County, ss:

I, F. W. Boss, county attorney of Cherokee county, Kansas, do solemnly swear that I know the contents of the foregoing amended information, and that the matters and things therein stated, and the allegations therein contained are true, so help me God.

F. W. BOSS.

Subscribed and sworn to before me this 30th day of March, 1914.

[SEAL.] O. W. FAIL,
Clerk of District Court.

Endorsed on back as follows: No. 2646. The State of Kansas, Plaintiff, v. The Missouri Pacific Railway Company, a Corporation, Defendant. Amended information. Filed March 30, 1914. O. W. Fail, district clerk, by Fred Simkin, deputy. Leave hereby granted to file this amended information, this 30th day of March, 1914. Edward E. Sapp, district judge. Witnesses for State: Ralph E. Martin, H. E. Cobb, D. H. Holt, O. W. Fail, Lou Winter, H. F. Brooks, George Moyer, H. J. Boulware, J. S. Collier, Emerson Hull, Oscar Hudson. (Record, pages 10 to 31.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus, Kansas.

No. 2646.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

10 *Answer.*

Comes now The Missouri Pacific Railway Company, the above-named defendant, and enters its plea of not guilty of the offense as charged in the complaint herein, for the following reasons:

I.

Neither said information nor any count thereof states or charges this defendant with the commission of any public offense, under the laws of the state of Kansas.

II.

That the act of the legislature of the state of Kansas, to wit: Chapter 248, Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, by reason of the provisions of sections 1 and 2 of the bill of rights of the state of Kansas, and by reason of the provisions of section 16 of article 2 of the constitution of the state of Kansas; and said act, under the provisions of which said information is made and filed is invalid, unconstitutional, null and void, for the reason that it is an attempt upon the part of the state of Kansas to regulate interstate commerce, and is in conflict with the provisions of section 8, article 1 of the constitution of the United States.

Answering, defendant further says that said chapter 248 of the Session laws of Kansas, 1913, is invalid, unconstitutional, null and void, for the reason that it contravenes the provisions of section 1 of the 14th amendment to the constitution of the United States, for that it abridges the privileges and immunities of citizens of the United States and deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the law, and said act of the legislature of the state of Kansas is unconstitutional, invalid, null and void, for the reason that it is an unwarranted and an unauthorized delegation to the agents and servants of common carriers of executive and judicial power, in that it, as attempted to be construed and applied by the information in this case, requires and compels the defendant company, its agents and servants, to occupy the position of a public informer or accuser, as to the nature of consignments entrusted to it as a common carrier, and thereupon and upon its own accusation, to hold a court of inquiry

and condemnation, and exercise judicial functions in determining whether shipments entrusted to it as a common carrier violate the provisions of the act, and, in the event that the agent or servant of the common carrier adjudges upon his own accusation that such consignment may violate the terms of the act, to render judgment in condemnation thereon, and confiscate the property to it intrusted as a common carrier, and such proceeding is to be held without
11 notice or an opportunity of the consignee to be heard, and such judgment in condemnation is to be made in secret, without a public hearing, and from which judgment there is no appeal, all in violation of section 1, article 1, and section 1, article 3 of the constitution of the state of Kansas.

III.

For further answer the defendant says that the act of the legislature of the state of Kansas, to wit: Chapter 248 of the Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, for the reason that it is confessedly on the face thereof an act of the state of Kansas regulating interstate commerce, and depends for its validity as an act regulating interstate commerce upon what is *properly* known as the Webb-Kenyon bill, which, on February 28, 1913, was attempted by the senate of the United States to be passed over the veto of the President of the United States upon a reconsideration of such act by the senate of the United States, and upon reconsideration of such bill, after the veto of the President, and upon the veto taken thereon, the said bill failed to receive the affirmative vote of two-thirds of the members of the senate of the United States, as is required by section 7, article 1, of the constitution of the United States, the said senate of the United States at said time being composed of ninety-five members, and upon such reconsideration but sixty-three of the members of the senate of the United States voted to pass said bill over the veto of the President of the United States.

Wherefore, Defendant prays that the proceedings herein be quashed, and that it be discharged herein.

AL F. WILLIAMS,
W. P. WAGGENER,
J. M. CHALLISS,
Attorneys for Defendant.

Endorsed on back as follows: No. 2646. In the district court of Cherokee county, Kansas. The State of Kansas, Plaintiff, v. The Missouri Pacific Railway Company, Defendant. Filed Dec. 11, 1914. O. W. Fail, District Clerk. Answer. W. P. Waggener, J. M. Challiss, Al F. Williams, Attorneys for Defendant.

Objection to Introduction of Testimony.

And afterwards, to wit, on the 11th day of December, 1914, the same being one of the regular days of the October, 1914, term of said district court, said cause having been continued from time to time and term to term, the same came on for hearing in its regular order, the plaintiff appearing by F. W. Boss, county attorney,
12 and the defendant, The Missouri Pacific Railway Company, a corporation, appearing by J. M. Challiss and Al F. Williams, its attorneys, both parties then and there in open court announced themselves ready for trial, and the trial was proceeded with. A jury was empaneled and qualified, and sworn to try said action, and said plaintiff made its opening statement and called its first witness, which was duly sworn, and upon a question being asked said witness by the plaintiff, the said defendant, by its attorneys, then and there made the following objection, to wit:

The defendant objects to the examination of this witness or the introduction of any testimony under the information filed in the case, for the reason the information is insufficient and does not state a public offense, for the reasons shown by the answer filed herein, and also in motion to quash, and for the further reason that chapter 248, Session Laws of Kansas for 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, by reason of the provisions of sections 1 and 2 of the bill of rights of the state of Kansas. And for the further reason that said chapter above referred to is inoperative, invalid, unconstitutional, null and void, by reason of the provisions of section 16, article 2, of the constitution of the state of Kansas, for that the same contains more than one subject, which is not clearly expressed in the title of the act; and for the further reason that said chapter 248 referred to is invalid, unconstitutional, null and void, for the reason that said act, which was originated and passed in the senate of the state of Kansas, was subsequently amended in the house of representatives of the state of Kansas and returned to the senate for its final passage and in the senate of the state of Kansas, the said bill was not read by sections on its final passage, as is required by section 15, article 2 of the constitution of the state of Kansas; and for the further reason that said chapter 248, above referred to is invalid, unconstitutional, null and void, for the reason that it is confessedly, on the face thereof, an act by the state of Kansas regulating interstate commerce and depends for its validity, as an act regulating interstate commerce upon what is popularly known as the Webb-Kenyon bill, a federal enactment which on February 28, 1913, was attempted by the senate of the United States, to be passed over the veto of the President of the United States, and upon reconsideration of such bill, after the veto of the President, and upon the vote taken thereon the said bill failed to receive the affirmative vote of two-thirds of the members of the senate of the United States as is required by section 7, article 1, of the constitution of the United

States, the said senate of the United States at said time being composed of ninety-five members, and upon such reconsideration but sixty-three of the members of the senate of the United States voted to pass said bill over the veto of the President of the United
13 States; and for the further reason that said chapter 248, as referred to above is unconstitutional, null and void, invalid and inoperative, because it is an attempt by the state of Kansas, to regulate the interstate shipment and delivery of intoxicating liquors, after the Congress of the United States has, by appropriate enactment, regulated such shipment and delivery and is in contravention of and in conflict with the provisions of section 9, article 1, of the constitution of the United States; and for the further reason that said chapter 248, redelivery and is in contravention of and in conflict with the pro— and of no effect, for the reason that it is by its terms made possible only by the provisions of the federal enactment popularly known as the Webb-Kenyon bill, and the said Webb-Kenyon bill is unconstitutional, null and void, and is inoperative and of no effect because, by its terms, it is an unwarranted and unconstitutional delegation by Congress to the states, and each thereof, of the power to regulate interstate commerce, which power is solely reposed by the constitution of the United States in the Congress of the United States, and is not to be delegated; and for the further reason that said chapter 248 is invalid, unconstitutional, null and void, for the reason that it contravenes and violates the provisions of section 1, of the fourteenth amendment to the constitution of the United States, in that it abridges the privileges and immunities of citizens of the United States, and deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the law; and for the further reason that said chapter 248 above referred to, is unconstitutional, null and void, invalid and of no effect, for the reason that it is an unwarranted and an unauthorized delegation to the agents and servants of common carriers of executive and judicial power, in that it, as attempted to be construed and applied by the information in this case, requires and compels the defendant company, its agents and servants, to occupy the position of a public informer or accuser, as to the nature of consignments entrusted to it as a common carrier, and thereupon and upon its own accusation, to hold a court of inquiry and condemnation and exercise judicial functions in determining whether shipments entrusted to it as a common carrier, violate the provisions of the act, and in the event that the agent or servants of the common carrier adjudges upon his own accusation, that such consignment may violate the terms of the act, to render judgment in condemnation thereon and confiscate the property to it entrusted as a common carrier, and such proceedings is to be held without notice, or an opportunity of the consignee to be heard, and such judgment in condemnation is to be made in secret without a public hearing, and from which judgment there is no appeal, all in violation of section
14 1, article 1, and section 1, article 3, of the constitution of the state of Kansas, which objection is by the court overruled as to the first, second, third, fourth, fifth, sixth, seventh, eighth,

ninth, tenth, eleventh and twelfth counts of the amended information, and sustained as to the thirteenth, fourteenth, fifteenth, sixteenth, seventeenth, eighteenth, nineteenth, twentieth, twenty-first, twenty-second, twenty-third, twenty-fourth and twenty-fifth counts of the amended information, to which ruling of the court the plaintiff and defendant each then and there duly excepted and excepts, and the plaintiff then and there reserved the question on said ruling as a reserved question for the purpose of an appeal to the supreme court. (Record, pages 36 to 39.)

During the trial of the case the plaintiff made the following offer:

The plaintiff now offers in evidence transcript taken from the record of the United States internal revenue office, showing that John Comba and James Depoli, for the year from July, 1912, to July, 1913, held an internal revenue license as wholesale malt liquor dealers, said certificate being certified to by the collector of internal revenue, said certificate being marked exhibit "B." To which offer the defendant objects for the reason it is incompetent, irrelevant and immaterial, hearsay and not the best evidence, not tending to prove or disprove any issue in this case, which objection is by the court sustained, to which ruling the State, at the time, duly excepted and excepts and reserves the question as a reserved question for appeal to the supreme court. (Record pages 98 to 100.)

In the Eleventh Judicial District Court of Cherokee County, State of Kansas, Sitting at Columbus, October Term, 1914.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Verdict.

We the jury find the defendant guilty of the offense charged in the first count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the second count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the third count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

15 We the jury find the defendant guilty of the offense charged in the fourth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the fifth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the sixth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the seventh count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the eighth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the ninth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the tenth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We the jury find the defendant guilty of the offense charged in the eleventh count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

We, the jury find the defendant guilty of the offense charged in the twelfth count of the information, committed all as in the manner and form charged therein.

J. M. HAMMETT, *Foreman.*

(Record page 41).

16 In the District Court of Cherokee County, Kansas, Sitting at Columbus.

No. 2646.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Journal Entry.

Now on this 15th day of December, 1914, the same being one of the regular days of the October, 1914 term of the above entitled court, and there being present all of the regular officers of the above court, the said court being in session, the above entitled cause came on for hearing in its regular order on the motion of the defendant for a new trial and rehearing, the plaintiff being present by F. W. Boss, county attorney of Cherokee county, Kansas, and defendant appearing by J. M. Challis and Al F. Williams, attorneys for said defendant, The Missouri Pacific Railway Company, a corporation, and the parties declaring themselves ready the argument on said motion was proceeded with, and the court having heard the argument and presentation of authority and being fully advised in the premises, doth overrule the said motion and each and every part thereof, to which ruling the said defendant at the time duly excepted and excepts; and thereupon, and on said day the said cause came on for the judgment and sentence of the court against the defendant, The Missouri Pacific Railway Company, a corporation, upon the verdict of guilty heretofore found and entered against said defendant by the jury, as charged in the first, second, third, fourth, fifth, sixth, seventh, eighth, ninth, tenth, eleventh, and twelfth counts of the amended information filed herein against said defendant, for the crimes of violating the Mahin law, by bringing intoxicating liquor into the state of Kansas in violation of law, as charged in each of said counts of said information, and said plaintiff and defendant appearing as before, the said defendant through its said attorneys, is informed by the court of the said verdict of guilty heretofore found against it as aforesaid, and is asked by the court whether there is any legal cause to show why judgment and sentence should not be pronounced against said defendant upon said verdict of guilty herein, and no sufficient cause being alleged or appearing to the court why judgment should not be pronounced;

It is therefore by the court considered, ordered and adjudged that judgment and sentence against said defendant, The Missouri Pacific Railway Company, a corporation, be, and the same is hereby rendered and pronounced upon the first count of said amended
17 information and verdict, that said defendant, The Missouri Pacific Railway Company, a corporation, be and it is hereby

adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00 and to pay the costs of this prosecution;

That upon the second count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the third count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00 and to pay the costs of this prosecution;

That upon the fourth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the fifth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the sixth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the seventh count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the eighth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the ninth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the tenth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the eleventh count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

That upon the twelfth count of said amended information and verdict the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas a fine in the sum of $100.00, and to pay the costs of this prosecution;

This judgment and sentence rendered and pronounced against the said defendant, The Missouri Pacific Railway Company, a
18 corporation, under all of said above named counts, is, that the said defendant be, and it is hereby adjudged and sentenced to pay to the state of Kansas fines in the total sum of $1200.00,

and to pay the costs of this prosecution, which costs are taxed at $ —, upon all of said counts, for which let execution issue.

To all of which the said defendant at the time duly excepted and excepts; and thereupon the defendant asks the court for sixty days time in which to make and settle its bill of exceptions to the supreme court, which was by the court then and there granted, and thereupon the state of Kansas, plaintiff, asked the court for sixty days time in which to present and settle its bill of exceptions in this cause and perfect its appeal to the supreme court on the questions reserved in it in the trial of this cause, which time was by the court then and there granted to said plaintiff. (Record pages 43 to 46.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Motion to Retax Costs.

Comes now the defendant named above and moves the court to retax the costs assessed against it herein and charged against it by the clerk of the above-entitled court, in the following particulars, to wit:

Defendant asks that the court strike from the costs charged against it the item of county attorney's fees in the sum of twenty-five dollars ($25) on each and every count upon which this defendant was convicted, said item of county attorney's fees aggregating the total sum of three hundred dollars ($300) on the twelve counts upon which this defendant was convicted, and upon which the said defendant has been sentenced, for the reason that said fees and each of them are illegal, unlawful, unauthorized, and constitute no part of the legitimate costs in the above-entitled case and this defendant is not liable therefor or for any part thereof, and for the further reason that there is no warrant of law for the charging up of said fees as against this defendant nor for the collecting of the same.

W. P. WAGGENER,
J. M. CHALLISS,
AL F. WILLIAMS,
Attorneys for Defendant.

19 Endorsed on back as follows: The State of Kansas, Plaintiff, v. Missouri Pacific Railway Company, Defendant. Motion to Retax Costs. Filed January 6, 1915. O. W. Fail, Clerk. W. P. Waggener, J. M. Challiss, Al F. Williams, attorneys for defendant. (Record page 48.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Journal Entry.

Now on this 9th day of January, 1915, the same being one of the regular judicial days of the January, 1915, term of the said district court, this cause came on for hearing on the motion to retax costs, filed by the defendant herein, the said plaintiff appearing by F. W. Boss, county attorney of Cherokee County, Kansas, and the said defendant appearing by Al F. Williams, its attorney. The court, after hearing the argument of counsel, and being fully advised in the premises, sustains said motion and orders said costs to be taxed by omitting and striking from the costs taxed in said action the sum of three hundred ($300) dollars, the same being twenty-five ($25) dollars on each of the counts on which said defendant was convicted and sentenced, taxed as attorney fee in said action for and on behalf of the county attorney for prosecuting said action.

To which ruling and order of the court the said plaintiff then and there excepted and excepts, and reserves the question on said ruling, order and decision of the court as a reserved question for the purpose of an appeal to the supreme court. Said plaintiff thereupon at the time asks for, and is by the court granted an extension of time of sixty days thereafter in which to prepare, secure the allowance of, and to file its bill of exceptions.

EDWARD E. SAPP,
District Judge.

(Record, page 50.)

20 In the District Court of Cherokee County, Kansas, Sitting at Columbus.

No. 2646.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Notice of Appeal.

To the Missouri Pacific Railway Company, a Corporation, Defendant, its Attorneys of Record and O. W. Fail, Clerk of the District Court of Cherokee County, Kansas:

You and each of you are hereby notified that the plaintiff herein, the state of Kansas, appeals to the supreme court of the state of

Kansas from the rulings, orders and judgments made and entered against said plaintiff by the district court of Cherokee county, Kansas, sitting at Columbus, during the trial of the above-entitled action in said court, on December 11th and 12th, A. D., 1914, and after judgment of conviction was rendered in said action on the 9th day of January, 1915, to which the said plaintiff made due and timely objection and saved its exceptions, and upon which questions were reserved by the said plaintiff for the purposes of an appeal to the supreme court of said state.

F. W. BOSS,
County Attorney of Cherokee County, Kansas.

Filed January 21, 1915, O. W. Fail, Clerk District Court, by Fred Simkin, Deputy.

(Record, page 4.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

No. 2646.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Affidavit.

I, F. W. Boss, county attorney of Cherokee county, Kansas, of lawful age, being first duly sworn on my oath, say that I am the attorney for the plaintiff in the above entitled action. That on January 21, 1915, I served the notice of appeal in the above
21 entitled action, of which the attached notice of appeal is a full, true, complete and exact copy, on Al F. Williams one of the attorneys of record of said defendant in said action, and the only attorney of record of said defendant residing in Cherokee county, Kansas, by delivering to said Al F. Williams personally, the said notice of appeal; that on the 21st day of January, 1915, I also served the said notice of appeal in the above action of which the attached notice of appeal is a full, true, complete and exact copy, on O. W. Fail, clerk of the district court of Cherokee county, Kansas, by delivering the same to the said O. W. Fail, clerk of said court, personally. That on the 21st day of January, 1915, I posted in a conspicuous place in the office of O. W. Fail, clerk of the district court of Cherokee county, Kansas, a notice of appeal in the above entitled action, of which the attached notice of appeal is a full, true, complete and exact copy.

Further affiant saith not.

F. W. BOSS.

Subscribed to in my presence, and sworn to before me, this 21st day of January, 1915.

O. W. FAIL,
Clerk of the District Court of Cherokee County, Kansas,
[SEAL.] By FRED SIMKIN,
Deputy.

(Record, page 5.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

No. 2646.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Notice of Appeal.

To the Missouri Pacific Railway Company, a Corporation, Defendant, its Attorneys of Record and O. W. Fail, Clerk of the District Court of Cherokee County, Kansas:

You and each of you are hereby notified that the plaintiff herein, The state of Kansas, appeals to the supreme court of the state of Kansas from the rulings, orders and judgments made and entered against said plaintiff by the district court of Cherokee county, Kansas, sitting at Columbus, during the trial of the above entitled action in said court, on December 11th and 12th, A. D., 1914, and after judgment of conviction was rendered in said action on
22 the 9th day of January, 1915, to which the said plaintiff made due and timely objection and saved its execptions, and upon which questions were reserved by the said plaintiff for the purposes of an appeal to the supreme court of said State.

F. W. BOSS,
County Attorney of Cherokee County, Kansas.

STATE OF KANSAS,
Cherokee County, ss:

I hereby certify that I received the notice of appeal of which the within is an exact duplicate, on the 21st day of January, 1915, and served the same on the 22d day of January, 1915, by delivering in said Cherokee county, Kansas, the said notice of appeal to the within named defendant, The Missouri Pacific Railway Company, a corporation, by delivering the same to H. J. Boulware, the local ticket and station agent of said defendant, at Corona, Cherokee county, Kansas, and in charge of said defendant's business and office, at said place, personally, the president, mayor, chairman of

board of directors, trustees and other chief officers, and the cashier, treasurer, secretary, clerk and managing agent of said defendant not being found in my county.

RALPH E. MARTIN,
Sheriff of Cherokee County, Kansas.

Serving this writ and return, 50 cents; mileage (24 miles), $2.40; car fare, 30 cents; total, $3.20.

Filed January 24, 1915. O. W. Fail, Clerk District Court, By Bess Hickman, Deputy.

(Record, page 6.)

In the District Court of Cherokee County, Kansas, Sitting at Columbus.

No. 2646.

THE STATE OF KANSAS, Plaintiff,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Defendant.

Allowance of Bill of Exceptions.

Now, on this 11th day of January, A. D. 1915, comes said plaintiff, by F. W. Boss, county attorney of Cherokee county, Kansas, and attorney for said plaintiff, and presents to me, the undersigned, E. E. Sapp, Judge of the district court of Cherokee county, Kansas, the above and foregoing plaintiff's bill of exceptions in the above entitled action, the same being presented within the time granted
23 by me to said plaintiff to prepare its bill of exceptions, and having carefully examined the same I do hereby sign and settle the same as a true, complete and correct bill of said plaintiff's exceptions in said action and direct that the same be filed.

EDWARD E. SAPP,
Judge of the District Court of Cherokee County, Kansas.

(Record, page 52.)

Reporter's Certificate.

I, L. H. Winter, do hereby certify that the above and foregoing 54 pages contain a full, true and correct transcript of my stenographic notes of all the testimony offered, or received on the trial of the above case, with all objections, rulings of the court and exceptions thereto.

L. H. WINTER,
Official Reporter of the 11th Judicial District of Kansas.

(Record, page 116.)

STATE OF KANSAS,
Cherokee County, ss:

I, the undersigned, judge of the eleventh judicial district court of Cherokee county, state of Kansas, hereby certify that the foregoing was presented to me as a case made in the case of The State of Kansas, Plaintiff, v. The Missouri Pacific Railway Company, Defendant, in the district court of Cherokee county, state of Kansas, sitting at Columbus, on the 11th day of January, 1915. That the defendant appeared by its attorney Al F. Williams, and the plaintiff appeared by F. W. Boss, county attorney; that the plaintiff did not present or suggest any amendments to said case made, that this case made contains a true and correct statement of all the pleadings, motions, orders, findings, evidence, proceedings, judgments, objections and exceptions had on the trial of said case, and was served on the plaintiff and presented for settlement in due time, as required by law and the order of this court. And I now settle and sign the same as a true and correct case made, and direct that it be attested and filed by the clerk of said district court of Cherokee county, Kansas.

Witness my hand at the court room, in the court house, in the city of Columbus, in Cherokee county, Kansas, this 11th day of January, A. D. 1915.

EDWARD E. SAPP,
Judge of the Eleventh Judicial District Court.

(Record, page 117.)

24 STATE OF KANSAS,
Cherokee County, ss:

I, O. W. Fail, clerk of the district court of Cherokee county, Kansas, do hereby certify that the above and foregoing is a true, full, complete and correct copy of the notices of appeal and proof of service thereof, of both plaintiff and defendant, plaintiff's bill of exceptions, and defendant's case made in the above entitled action, as the same remain of record and on file at my office in the city of Columbus, Cherokee county, Kansas.

Witness my hand and the official seal of said court, affixed at my office in the city of Columbus, Kansas, this 10th day of February, A. D. 1915.

[SEAL.] O. W. FAIL,
Clerk District Court, 11th Judicial District of Kansas.

(Record, page 7.)

25 Filed Sep. 11, 1915. D. A. Valentine, Clerk Supreme Court.

In the Supreme Court of the State of Kansas.

No. 19894.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from the District Court of Cherokee County, Kansas.

Hon. Edw. E. Sapp, Judge.

Question Discussed: Why the Webb-Kenyon Act and the Mahin Law are Void.

Abstract and Brief of Appellant.

W. P. Waggener, of Atchison, Kansas;
Al. F. Williams, of Columbus, Kansas;
J. M. Challiss, of Atchison, Kansas,
Attorneys for Appellant.

26 In the Supreme Court of the State of Kansas.

No. 19894.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Assignments of Error.

The defendant in the above entitled action complains of errors committed in the rulings, orders and decisions of the District Court in the trial of said cause in the District Court of Cherokee County, Kansas, sitting at Columbus, on the 18th day of May, 1914, the same being at the May, 1914, term of said court, and on the 11th and 12th days of December, 1914, the same being at the October 1914 term of said court, to which rulings, orders and decisions timely objections and exceptions were duly taken and saved by said defendant, for the purpose of an appeal to this court. A
27 transcript of the record of said proceedings had in the said cause, duly certified to, is attached to and filed herewith and made a part hereof, and the said defendant alleges that there is error in said record and proceedings in this, to-wit:

First.

The said District Court erred in overruling and denying defendant's motion to quash the amended information.

Second.

The court erred in overruling and denying the defendant's objection to the introduction of any evidence under the amended information.

Third.

The court erred in the admission of incompetent, irrelevant and immaterial evidence upon the trial of said action.

Fourth.

The court erred in not instructing the jury to return a verdict in favor of the defendant.

Fifth.

The court erred in certain instructions given to the jury.

Sixth.

The court erred in refusing to give to the jury instructions requested by the defendant.

Seventh.

The court erred in rendering judgment against the defendant upon the verdict of the jury.

28 Eighth.

The court erred in rendering judgment against the defendant for costs.

Ninth.

The court erred in denying defendant a new trial.

In order to save duplication and incumbering the record, the defendant does not here reproduce the information filed against it, its answer, its objections to the introduction of any evidence under the amended information, nor final judgment or notice of appeal, all of which have been reproduced in the abstract of the State upon its appeal, and in addition thereto, the defendant calls attention to the following matters.

On the 18th day of April, 1914, the defendant filed its motion to set aside and quash the information, as follows:

Motion to Set Aside and Quash Amended Information.

Comes now The Missouri Pacific Railway Company, the above named defendant, by its attorneys W. P. Waggener, J. M. Challiss and Al F. Williams, and moves the court to set aside, quash and

hold for naught the amended information, and each and every
29 count thereof, filed in the above entitled court, in the above entitled action, on March 30th, 1914, for the following reasons and upon the following grounds, to-wit:

First.

Neither said information nor any count thereof states or charges this defendant with a commission of any public offense.

Second.

Neither the facts set forth in said information nor the facts set forth in any count thereof, constitute any public offense under the laws of the State of Kansas.

Third.

Neither said information nor any count thereof is definite or certain as regards this defendant, and said information and each count thereof is so indefinite and uncertain that this defendant cannot plead thereto.

Fourth.

Said information is defective and insufficient for that at the time of filing the same, the County Attorney failed to endorse thereon the names of the witnesses known to him, as required by law.

Fifth.

There is not now, nor was there at any of the times named in said information any valid or constitutional Law of the State of Kansas, making the acts charged in said information, or any count thereof, a public offense.

30 Sixth.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, by reason of the provisions of Sections 1 and 2 of the Bill of Rights of the State of Kansas.

Seventh.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, by reason of the provisions of Section 16 of Article 2 of the Constitution of the State of Kansas, for that the same contains more than one subject, which is not clearly expressed in the title of the Act.

Eighth.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, for the reason that the said Act, which was originated and passed in the Senate of the — Kansas, was subsequently amended in the House of Representatives of the State of Kansas, and returned to the Senate for its final passage, and, in the Senate of the State of Kansas, the said bill was not read by sections on its final passage, as is required by Section 15, Article 2 of the Constitution of the State of Kansas.

31 Ninth.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, for the reason that it is confessedly on the face thereof, an act by the State of Kansas regulating Interstate commerce, and depends for its validity as an act regulating Interstate commerce upon what is popularly known as the Webb-Kenyon Bill, a Federal enactment, which, on February 28th, 1913, was attempted by the Senate of the United States to be passed over the veto of the President of the United States, upon a reconsideration of such Act by the Senate of the United States, and upon re-consideration of such bill, after the veto of the President, and upon the vote taken thereon, the said bill failed to receive the affirmative vote of two-thirds of the members of the Senate of the United States, as is required by Section 7, Article 1 of the Constitution of the United States; the said Senate of the United States at said time being composed of ninety-five members, and upon such reconsideration but sixty-three of the members of the Senate of the United States voted to pass said bill over the veto of the President of the United States.

Tenth.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional,
32 null and void, because it is an attempt by the State of Kansas to regulate the Interstate shipment and delivery of intoxicating liquors, after the Congress of the United States has, by appropriate enactment, regulated such shipment and delivery, and is in contravention of and in conflict with the provisions of Section 8, Article 1 of the Constitution of the United States.

Eleven.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, being an act as apparent on the

face thereof, regulating Interstate commerce, is based upon and made possible only by the terms and provisions of the Federal enactment, popularly known as the Webb-Kenyon Bill, which passed the Senate of the United States over the veto of the President on February 28th, 1913, and the said Webb-Kenyon Bill is unconstitutional, null and void and of no effect, for that it is by its terms an unwarranted and unconstitutional delegation by Congress to the States and each thereof of the power to regulate Interstate commerce, which power is solely reposed by the Constitution of the United States in the Congress of the United States, and is not to be delegated.

Twelve.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of Kansas, 1913, under the provisions of which said information is made and filed, is invalid, unconstitutional, null and void, for the reason that it contravenes the
33 provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, for that it abridges the privileges and immunities of citizens of the United States, and deprives the defendant of its property without due process of law, and denies to the defendant the equal protection of the law.

Thirteen.

The Act of the Legislature of the State of Kansas, to-wit: Chapter 248 of the Session Laws of 1913, under the provision of which said information is made and filed, is unconstitutional, invalid, null and void, for the reason that it is an unwarranted and an unauthorized delegation to the agents and servants of common carriers of executive and judicial power, in that it, as attempted to be construed and applied by the information in this case, requires and compels the defendant company, its agents and servants, to occupy the position of a public informer or accuser, as to the nature of consignments entrusted to it as a common carrier, and thereupon and upon its own accusation, to hold a court of inquiry and condemnation, and exercise judicial functions in determining whether shipments entrusted to it as a common carrier violate the provisions of the act, and, in the event that the agent or servant of the common carrier, adjudges upon his own accusation that such consignment may violate the terms of the act, to render judgment in condemnation thereon, and confiscate the property to it entrusted as a common carrier, and such
proceeding is to be held without notice or an opportunity of
34 the consignee to be heard, and such judgment in condemnation is to be made in secret, without a public hearing, and from which judgment there is no appeal, all in violation of Section 1, Article 1, and Section 1, Article 3, of the Constitution of the State of Kansas.

Upon the hearing of said motion and in support thereof, the defendant called to the attention of the court, and introduced in evidence, although judicial notice would be taken thereof, that portion of the congressional record, volume 49, No. 72, comprising pages

4457 to 4465, inclusive, being the veto message of the President of the United States to the so-called Webb-Kenyon Act, Senate bill 4043, and the action of the Senate of the United States thereon.

The said Webb-Kenyon Act being entitled "An Act divesting intoxicating liquors of their interstate character in certain cases," was considered by the Senate of the United States, and upon a vote being taken, the following proceedings were had:

The President pro tempore. The question is, shall the bill pass, the objections of the President of the United States to the contrary notwithstanding? Upon that question the roll will be called.

The Secretary proceeded to call the roll.

Mr. Briggs (when his name was called). I have a general pair with the senior Senator from West Virginia (Mr. Watson). In his absence, I withhold my vote.

35 Mr. Clark of Wyoming (when his name was called). I have a general pair with the senior Senator from Missouri (Mr. Stone). In the absence of that Senator I withhold my vote.

The roll call having been concluded, the result was announced: Yeas 63, nays 21, as follows:

YEAS—63.

Ashurst	Gallinger	Oliver
Borah	Gamble	Overman
Brady	Gardner	Owen
Bristow	Gore	Page
Brown	Gronna	Pittman
Bryan	Jackson	Poindexter
Burnham	Johnson of Maine	Sheppard
Burton	Johnston of Alabama	Shively
Chamberlain	Jones	Simmons
Chilton	Kavanaugh	Smith, Ariz.
Clapp	Kenyon	Smith, Ga.
Clarke of Arkansas	Kern	Smith, Md.
Crawford	Lea	Smith, Mich.
Culberson	Lodge	Smith, S. C.
Cullom	McCumber	Smoot
Cummins	Martin of Virginia	Swanson
Curtis	Myers	Thomas
Dillingham	Nelson	Thornton
Dixon	Newlands	Tillman
Fall		Townsend
Fletcher		Webb
		Williams
36		Works

NAYS—21.

Bradley	McLean	Pomerene
Brandegee	Martin, N. J.	Richardson
Catron	O'Gorman	Root
Crane	Paynter	Stephenson
Du Pont	Penrose	Sutherland
Foster	Percy	Warren
Guggenheim	Perkins	Wetmore

NOT VOTING—11.

Bacon	Clark, Wyo.	Reed
Bankhead	Hitchcock	Stone
Bourne	La Follette	Watson
Briggs	Lippitt	

The President pro tempore. On the question, Shall the bill pass the objections of the President of the United States to the contrary notwithstanding?—the yeas are 63, the nays are 21. More than two-thirds of the Senators present voted in the affirmative, the bill is passed.

The above motion was not copied in the transcript of the record, through an oversight of the clerk, and we have supplied it in this abstract. Reference to same is found on page thirty-two of the transcript. Which motion, after being heard on the 18th of May, 1914, was denied and overruled by the court, exception duly saved, and thereupon the defendant filed its answer, and the trial proceeded.

37 *Testimony of H. J. Boulware.*

I am agent for the Missouri Pacific Railway Company at Corona. My duties are to deliver freight, receive and bill out freight, and telegraph operator; ticket and express agent. The Missouri Pacific Railway Company is a corporation and common carrier; does an ordinary railroad business. It extends from Pueblo to St. Louis, and over into Missouri at Kansas City. Does not operate into Illinois.

I am familiar with the requirements of the Mahin Law. Was furnished with blanks for use thereunder. I personally made out reports required by the law, and filed them with the County Clerk at Columbus. It is a report of the shipments, giving the name of consignee and consignor, destination, date of delivery and contents. This is an exact report.

"Q. Calling your attention to June 3rd, are you able to state to the jury, and if you are, I wish you would, whether on or about that date, June 3rd, 1913, the defendant company received at Corona a consignment for John Combi?

The defendant objects to this question, for the reason that it is incompetent, irrelevant and immaterial; an invasion of the constitutional rights of the defendant, producing a witness against itself, and not the best evidence, which objection is overruled; to which ruling the defendant at the time duly excepted and excepts."

June 3rd is a consignment by Dick Bros., Quincy, Illinois, to John Combi, Corona, which contained beer to the weight of 30,000 pounds. (Tr. p. 62.) This was about a carload. There was another consignment on June 7th, from Dick Brothers, Kansas City, Mis-
38 souri, to Corona, Kansas, which was delivered on June 7th. (Tr. p. 64.) There were other shipments on June 5th and May 26th and May 30th to John Combi, all of which came over the Missouri Pacific to Corona, and came from points outside the state

of Kansas. There were two shipments to James Depoli on June 2nd, and on June 10th, 11th, 13th, and May 26th and May 30th and 31st. These were carloads, containing kegs, half barrels, cases and casks, and all came from points outside the state of Kansas. These shipments came in the ordinary course of freight business. I was acquainted with John Combi.

"Q. Now, Mr. Boulware, during that time, on and prior to May 13th, 1913, were you acquainted with the general reputation of John Combi, as to the business or occupation he was in; I speak now of his general reputation about Corona?

To which the defendant objects, for the reason, it is incompetent, irrelevant and immaterial; not proving or tending to prove any issue in this case.

Objection overruled, defendant excepting.

A. Yes sir, by hearsay.

Q. State what that general reputation was?

Same objection, same ruling and same exception.

A. People claimed that he was in the wholesale beer business.

Q. Well, was it the general reputation that he was in the wholesale beer business?

Same objection, same ruling and same exception.

39 A. Well, it was common among some people talking that he was in the wholesale beer business."

I know James Depoli.

"Q. Do you know what his general reputation was in and around Corona, up to and including the times of these deliveries, as to whether he was a wholesale beer merchant or not? Do you know what his general reputation was in that respect?

A. Yes sir, he was a wholesaler, same as Combi." (Tr. p. 75.)

I do not know of my own knowledge whether Dick Brothers have a distributing station on the line of the Missouri Pacific Railway Company at Kansas City. These shipments could have been handled by some belt line or company, and delivered to the Missouri Pacific Railway Company; could have been handled by the Wabash and split in two and make two shipments of it. All of the Depoli shipments came from Minden, Missouri. The Frisco has a line into Minden. I understand the Frisco has a spur at that point. These shipments could be originated on the Frisco and by the Frisco turned over to the Missouri Pacific Railway Company at Minden.

As soon as this law went into effect, the railway company at once furnished me with a copy of the law and certain blanks which was required of the consignee of liquor shipments to sign. (Tr. p. 80.) In each instance, both Depoli and Combi, I required them to sign one of these statements, and read the statement to them, so that they would know what they were signing in each instance. The paper you hand me, marked "Defendant's Exhibit No. 1,"

40 is a release to the Company, and a statement made by him that this is for his own personal use. It is one of the series

of so-called releases or statements that I took from John Combi, covering one of the shipments in this controversy, and is signed by John Combi himself, and was read to him before it was signed and accepted by me. (Tr. p. 81.)

"It is admitted by the state that in all of the shipments in controversy, the written statement required by the statute was taken in each instance, statements as shown by Defendant's Exhibit No. 1, showing consignee, dates and amounts, which were all read to the consignee as required by law."

In the conduct of the business of my office as agent, I required those written statements from other consignees, as well as those men mentioned. There are others who received liquor at that point in similar and smaller quantities, as my reports will show.

I do not know of the Missouri Pacific Railway company having any interest as owner or otherwise, than as a transportation agency or common carrier, in any of the beer involved in this controversy. I, as agent of the company, did not sell any beer there. I do not know of any of the contents of any of these cars having been sold in violation of the liquor laws of the state of Kansas. This beer was received in Corona in ordinary course of transportation, and when it was delivered to the consignee, I was simply acting as the
41 delivering agent of the company. At the time I delivered the same, I had no intention of delivering any beer for any unlawful purposes. I delivered it on the statement that it was for their own personal use. (Tr. p. 83). I made delivery in each instance mentioned in the information to the parties to whom it was consigned, and these men are over twenty-one years of age, and in each instance they signed the statement required by law, that the beer was for their own personal use. (Tr. p. 84).

I had no specific knowledge that Depoli was going to sell this beer. No specific information; nobody told me. I mean by that statement he signed that it was for his own personal use. That was all I knew. I didn't think he was going to drink it all. I didn't gather from the statement he made that he was going to use it in violation of law. He stated it was for his own personal use.

"Q. Did you believe at that time that Jas. Depoli was going to use that intoxicating liquor all of it for a lawful purpose?

Defendant objects for the reason the question is incompetent, including something not required by the statute; for the further reason that it is the cross-examination of its own witness.

Objection overruled; defendant excepting.

A. He says so, and that is all I have got to go by." (Tr. p. 87).

42 *Testimony of Emerson Hull.*

I am County Clerk of Cherokee County. It is my duty to receive the reports from railroad companies and other persons who receive and deliver intoxicating liquors. Paper handed me Exhibit A are reports of shipments of intoxicating liquor received at Corona, Kansas, June 13th, and filed in my office on the 23rd day of June.

"Plaintiff now offers in evidence paper marked Exhibit A identified by witness, to which offer the defendant objects for the reason it is incompetent, irrelevant and immaterial and invasion of the constitutional rights of the defendant, which objection is overruled as to that part of the exhibit, covering the first twelve counts of the information herein and sustained as to the balance, to which adverse ruling of the court the defendant, at the time, duly excepted and excepts." (Tr. p. 89).

Exhibit A is known as form 4918, Missouri Pacific Railway Company, and gives the date of delivery, name and post office address of consignor, name and postoffice address of consignee, to whom delivered, and the kind and amount of liquor involved in the shipments, and corresponding to the first twelve counts of the amended information (Tr. p. 90).

The plaintiff offered, and it was received in evidence, over the objection and exception of the defendant, Justice Docket of H. F. Brooks, Justice of the Peace of Ross Township of criminal action against Jas. Depoli, instituted August 12th, 1912, showing
43 plea of guilty, imposition of fine and subsequent appeal of the District Court. Plaintiff also offered in evidence, over the objection and exception of the defendant, Justice Docket of H. F. Brooks, Justice of the Peace, Ross Township, in criminal action against Jas. Depoli, instituted October 10th, 1912, showing plea of guilty and imposition of fine, and subsequent appeal to the District Court. Plaintiff also offered, and it was received in evidence, over the objection and exception of the defendant, Justice Docket of H. F. Brooks, Justice of the Peace, Ross Township, of criminal action State of Kansas against John Combi, instituted August 12th, 1912, showing plea of guilty, imposition of fine and subsequent appeal to the District Court. Plaintiff also offered in evidence, over the objection and exception of defendant, Justice Docket of H. F. Brooks, Justice of the Peace, Ross Township, in the criminal action State of Kansas against John Combi, instituted September 10th, 1912, entry of plea of guilty, imposition of fine and subsequent appeal to the District Court, all of which appeals were subsequently dismissed. (Tr. p. 97).

Defendant offered in evidence, Exhibit 1, in words and figures as follows:

"Form 4919. 6-13. 50 M. D. D.

Receiver's Statement Certifying He is Consignee of Intoxicating Liquor for His Own Use, Shipped to Him via Mo. Pac. Ry. Co.

In compliance with Kansas Senate Bill No. 672.

44 I hereby certify that my name is John Combi; that my postoffice address is Corona, Kansas; that I am more than twenty-one years of age; that I am the consignee to whom a package containing 15 cases, 5 casks, 100 half barrels and 75 kegs of Beer *of*

intoxicating liquor was consigned at Quincy, Ills., on May 20, 1913, for my own use.

Signed and dated at Corona, Kansas, this 26th day of May, 1913.

Signature, JOHN COMBI,
Consignee.

Way-bill form. Quincy. To Corona No. 9. Dated 5-30 F51."

Thereupon the court, among other things, instructed the jury as follows:

"Sixth. You are further instructed that the general reputation of the consignees named in the various counts in the information, in the community in which they reside, at the time such consignments were made and received as alleged in the information, and prior thereto, as being men engaged in the wholesale liquor business in the vicinity of Corona, Cherokee County, Kansas, in violation of the laws of the State of Kansas, the knowledge of such reputation by the agent of the defendant company, is a circumstance which you may take into consideration in determining whether or not the defendant company had knowledge that the consignments of liquor were to be used in violation of the law, and, you are further instructed that the knowledge of the agent of the defendant company is binding upon the company itself, and it must take notice of such knowledge.

45 Seventh. But you are further instructed that the mere fact that the consignee to whom was delivered the intoxicating liquors complained of herein, had, prior to said dates, been engaged in the unlawful sale of intoxicating liquors within the state of Kansas, if it be a fact, is not any evidence that at the time he received such consignments, or shipments, that he had then any intent to violate any of the laws of the State of Kansas, and the defendant, its servants, agents and employees, had the right to rely upon the assumption of the law that the consignee would not have such intent, and did not intend to violate any of the laws of the State of Kansas."

The defendant requested the court to give the following instructions to the jury, all of which were refused and exceptions noted:

Instructions Requested by the Defendant.

1.

The jury is instructed that, under the information, plea and answer in this case, and the evidence, the plaintiff is not entitled to a verdict, and your verdict will, therefore, be in favor of the defendant company, Not Guilty.

2.

The jury is instructed that, if you find from the evidence that at the various times mentioned in the information herein, the

46 Defendant Company delivered to the consignees, certain shipments of intoxicating liquor, the Defendant Company took from the consignee, a written statement, in substance, as follows:

"I hereby state that my name is —— ——; that my post office address is ——, Kansas; that I am more than 21 years of age; that I am the consignee to whom a package of —— intoxicating liquor was consigned at ——, on ——, on 19—, for my own use.

Signed and dated at ——, Kansas, this — day of ——, 191–.

Signature: —— ——,

Consignee."

which said statement was signed by the consignee, and delivered to the agent of the Defendant Company, then you will find the Defendant not guilty.

6.

If you find that the point of origin of any of the shipments of liquor in controversy herein was without the State of Kansas, or that any portion of the transportation of such liquor by the defendant company was through one of the states of the United States, other than the State of Kansas, then such transportation, and the regulation thereof, constitutes transportation in the course of Interstate Commerce, which is the sole subject of Federal regulation, and the Legislature of the State of Kansas, by virtue of Chapter 248, Session laws of 1913, has no jurisdiction of the subject of Interstate Commerce, and your verdict will be for the Defendant Company on all counts of the information involving Interstate shipments.

47 7.

The jury is instructed that if you find from the evidence that the defendant was not interested in the intoxicating liquors in question, other than as a common carrier, and providing transportation therefor, and in the transportation of such liquors, had no unlawful intent, excepting to furnish transportation upon demand of a commodity tendered to it for that purpose, then the purpose for which the consignee of such intoxicating liquors intended to use the same was of no concern to the defendant company, and your verdict should be Not Guilty.

8.

The jury is instructed that it is charged in the information in this matter, relative to the delivery of intoxicating liquors to the various consignees, that, "the said purposed and intended delivery of said intoxicating liquors to said (the consignee) not being for a lawful purpose, but the said liquor being then and there intended by said (the consignee) to be used in violation of the prohibitory liquor law of the State of Kansas, and the said defendant Missouri Pacific Railway Company, then and there well knew that said purposed and intended delivery as aforesaid was not for a lawful purpose, but was for the unlawful purpose aforesaid."

If you find from the evidence that the defendant company delivered said liquor in the ordinary course of transportation, and upon

completion thereof, and delivered said liquors by reason of
48 the fact that they had reached their destination and were demanded by the consignee, in the ordinary course of business, then the purpose of such delivery would not be unlawful.

9.

A common carrier cannot be made responsible or liable for the acts of one of its consignees, who received goods from it in actual transportation, after such goods had been delivered to the consignee, and if the consignee of intoxicating liquors complies with the law, by making and delivering the written statement required by the law to the carrier, even though the consignee should subsequently on receipt of intoxicating liquors so transported, use them for an unlawful purpose, the carrier would not be liable therefor, in a criminal action.

10.

The statute, under which this prosecution was instituted, provides that it shall be unlawful for any common carrier to carry any intoxicating liquor into this state, or to deliver the same to any person within the state, except for lawful purposes. The lawful purposes contemplated by this act is the purpose and intent of the carrier, and not the purpose and intent of the party receiving the intoxicating liquor, and if you find from the evidence herein that the defendant did carry from without the State of Kansas to points within the State of Kansas, intoxicating liquor, and there deliver the same to the consignees, of such shipments, and that in doing so, the
49 defendant company simply acted as a common carrier in the transportation of commodities from point to point, and had no interest in said intoxicating liquors, and itself did not use said liquors, in violation of the prohibitory law of the State of Kansas, then the defendant is not to be criminally liable, and your verdict must be Not Guilty.

11.

The transportation of intoxicating liquor by a common carrier, or railroad, is a legitimate lawful business, recognized, regulated and protected by law, and if a common carrier, in the transportation of intoxicating liquor, simply acts as a carrier only, and does not have any interest in the goods, and does not, itself, use the same for an unlawful purpose, it cannot be guilty of any offense against the laws of the State.

15.

Under the information in this case, it is charged that the defendant company well knew when it delivered the intoxicating liquors in question to the consignees that they were to be used for an unlawful purpose. In this connection you are instructed that before you can convict the defendant, you must be satisfied beyond a reasonable doubt that the defendant company had positive knowledge of the

intention of the consignee- to use such liquors for an unlawful purpose, and this positive knowledge is not to be inferred from circumstances, rumor or suspicion, but must be brought to the
50 defendant before it can be charged with such guilty knowledge, and the mere fact, if it be a fact, that the consignees on the shipments in question may have, at some time either prior or subsequent to said shipments, been engaged in the selling of intoxicating liquors, contrary to law, is no evidence of knowledge upon the part of the defendant company, with reference to the unlawful intention of the consignees, covering the particular shipments complained of.

17.

Everyone is presumed to obey the law, and do his just duty, and the defendant in this case is entitled to rely upon such presumption, and nothing is to be inferred against it or criminal responsibility attached to it, by reason of the conduct or concealed intentions of others, and if you find from the evidence in this case that the consignees in the shipments in question stated to the agent of the defendant company that the intoxicating liquors were for their own use and signed and delivered statements in writing to that effect to the agent of the defendant company, the said agent could rely upon such assurances, and making such assurances and giving such statement would be evidence to the effect that the defendant company knew that such liquors were to be used for an unlawful purpose.

Motion for a new trial, on all applicable statutory ground, was duly filed, considered by the court, and overruled, the defendant duly excepting.

51 The above and foregoing is a true and correct abstract of so much of the record in the above entitled case as has not been abstracted by the state, as the defendant deems necessary for the consideration of the court in the presentation of the questions involved herein.

W. P. WAGGENER,
J. M. CHALLISS,
A. F. WILLIAMS,
Attorneys for Defendant, The Missouri Pacific Railway Company.

52 19984.

Filed Oct. 4, 1915. D. A. Valentine, Clerk Supreme Court.

No. 19894.

In the Supreme Court of the State of Kansas.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

Appeal from the District Court of Cherokee County, Kansas.

Edward E. Sapp, Judge.

Counter-abstract and Brief of Appellee.

S. M. Brewster, Attorney-General;
F. W. Boss, County Attorney,
Attorneys for Appellee.

53 In the Supreme Court of the State of Kansas.

No. 19894.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, a Corporation, Appellant.

Counter-abstract and Brief of Appellee.

In addition to the testimony of the witness H. J. Boulware, as abstracted by appellant, the said witness testified as follows:

I have lived at Carona for two years and eight months, and continuously during that time have been agent for the defendant, the Missouri Pacific, at that place. (Tr. 57.)

Thirty thousand pounds of beer make an average carload. (Tr. 63.)

The letters in the report (Form 4918, Ex. "A") "V. B. B. Co.," "C. B. Co.," and "D. B. B. Co.," respectively, signify Val Blatz Brewing Company, Columbia Brewing Company, and Dick Brothers Brewing Company. (Tr. 71.)

I was acquainted with the person named in the report, John Comba, sometimes named in the report as J. Comba, and also with James Depoli, sometimes named in the report as J. Depoli. I have known both of these persons ever since I came to Carona. They both lived there from the time that I came and during all the time

that all of the shipments referred to were made. During all this time I was acquainted with the general reputation in and about Carona of both of these men as to the business they were in, and during all this time, including the times the shipments in question were made, they had the general reputation of being in the wholesale beer business in and around Carona. (Tr. 73, 74, 75.)

James Depoli's family consists of a wife and two children, and John Comba's family consisted of a wife and three children. (Tr. 84, 91.)

Form 4918, being the report of the shipments in question made by the defendant company under the Mahin law, and being Exhibit "A" in the case, is as follows (Tr. 90):

EXHIBIT A.

Form 4918.—6-13-10, M. D. D.

Report of Shipments of Intoxicating Liquors Delivered at Carona, Kansas, Station, Month of June, 1-16-13.

Date of delivery.	Pro. No.	Consignor. Name.	Consignor. Post-office address.	Consignee. Name.	Consignee. Post-office address.	To whom delivered.	Kind and amt. liquor.
6- 3	f14	D. B. B. Co.	Quincy	John Comba,	Carona, Kansas.	John Comba,	Beer, 30,000
6- 7	90	D. B. B. Co.	Kansas City	J. Comba,	" "	J. Comba,	" 13,200
6- 5	66	D. B. B. Co.	" "	J. Comba,	" "	J. Comba,	" 10,000
5-26	f51	"	Quincy, Ill	J. Comba,	" "	J. Comba,	" 30,500
5-30	f62	"	" "	J. Comba,	" "	J. Comba,	" 30,800
6- 2	9	C. B. Co.	Minden	J. Depoli,	" "	J. Depoli,	" 16,760
6-10	143	C. B. Co.	"	J. Depoli,	" "	J. Depoli,	" 17,100
6-11	165	C. B. Co.	"	J. Depoli,	" "	J. Depoli,	" 17,150
6-14	232	V. B. B. Co.	"	J. Depoli,	" "	J. Depoli,	" 14,340
5-26	457	C. B. Co.	"	J. Depoli,	" "	J. Depoli,	" 16,710
5-30	528	C. B. Co.	"	J. Depoli,	" "	J. Depoli,	" 11,200
5-31	348	C. B. Co.	"	J. Depoli,	" "	J. Depoli,	" 18,700

H. J. BOULWARE, *Agt.*

55 *Instructions Given by the Court Below.*

(Tr., 101-107.)

Gentlemen of the jury:

The instructions about to be given you by the court is the law that will govern you in this case, and you are instructed as follows:

First. You are the exclusive judges of all the questions of fact in this case, and of the credibility of the witnesses who have testified before you, and the weight you will give the testimony of each of them. This is peculiarly your province, and it is of the greatest importance that you weigh the testimony carefully, so that you may ascertain the very truth if it is possible to do so.

Your finding of facts is the very foundation upon which the judgment of law must rest, and while your findings, where there is conflicting evidence, can not be corrected, errors of law, committed by this court, may be corrected; and the court impresses upon you the importance of a careful, unbiased, unprejudiced and intelligent consideration of the testimony.

You are to determine from the appearance of the witnesses on the stand; their manner of testifying; their candor and fairness; the degree of intelligence they possess; their interest, if any, in the result of your verdict; their means of knowing the facts concerning which they have testified; their temper, feeling, bias, or prejudice. if any has been shown, and from all other circumstances appearing on the trial, which witness you will believe, and what weight you will give to the testimony of each. If the testimony of a witness has been fair, is not unreasonable or improbable, is consistent with itself, and the witness has not been impeached, you have no right to disregard such testimony without cause. If you find any apparent conflict in the testimony in this case it is your duty to reconcile all such, and all parts thereof, if reasonably possible, giving to each witness credit for truthfulness; and in thus weighing and attempting to reconcile the testimony you should take into consideration the opportunities of the respective witnesses to see and know what took place or was said, whether the opportunities of one witness were superior to those of another or others, and whether the intelligence or memory of one witness is superior to those of another or others; but if you can not thus reconcile the testimony, then you are to determine and decide for yourselves whom you will believe. In case you find that a witness has deliberately and intentionally, or willfully and corruptly testified falsely to any material fact in the case, you may disregard and reject the entire testimony of such witness, but you are not obliged to do so, for a witness may be truthful to a portion of his or her testimony and false as to the balance.

56 By the averments of the information filed in this case on the 24th day of March, 1914, it is charged, in substance, that the defendant, the Missouri Pacific Railway Company, a corporation, at and in the county of Cherokee and within the state of Kansas,

did then and there, being a common carrier, and on the 3d day of June, 1913, unlawfully carry from without the state of Kansas to within the state of Kansas intoxicating liquors, to wit, 30,000 pounds of beer, for the purpose of delivering the said intoxicating liquors to another, to wit, John Comba, he, the said John Comba, being then and there interested in the said intoxicating liquors as consignee, and for the purpose of delivering to the said John Comba said intoxicating liquors, the same not to be used for lawful purposes, but the said liquor was then and there intended by the said John Comba to be used in violation of the prohibitory liquor law of the state of Kansas, contrary to the peace and dignity of the state of Kansas. There are twelve counts in said information, each stating a separate and distinct offense of like character; in five of said counts it being alleged that the goods were consigned and delivered to John Comba, and in seven of which counts the goods were consigned and delivered to James Depoli, which charged the offense of carrying intoxicating liquors into the state of Kansas for unlawful purposes.

The defendant for answer and plea thereto enters a plea of not guilty, and further denies and says that said information, or any count thereof, charges a public offense against the laws of the state of Kansas, and further says that the act of the legislature upon which said information is based is invalid, unconstitutional and void, for the various reasons set forth in defendant's answer.

And for further answer and plea of not guilty, says that the act of the legislature upon which the said information is based depends for its validity upon what is known as the Webb-Kenyon bill, which bill was not properly passed over the veto of the President, and is consequently unconstitutional and void.

This plea was entered in its behalf, and it joined issues upon and puts The State upon proof of every material fact alleged against the defendant. And now it is the question of the innocence or guilt of these charges against it that you are called upon to try and determine and declare by your verdict herein.

The law presumes the defendant innocent of all and each of the offenses imputed to him. And it may rest upon the presumption of innocence, and has the right to rest upon it, and following its plea of not guilty, it does rest upon it, and it is a shield and a protection to it, without evidence upon its part, until it is broken down or overcome and its guilt of some one of the offenses imputed to it by the information in this case is established beyond a reason-
57 able doubt by the evidence in this case. A reasonable doubt, as here used and as used at all times in these instructions, is a doubt which has some reason for its basis, and is that state of the case, which, after a full consideration of all the evidence, your minds are left in such condition that you can not say you feel an abiding conviction to a moral certainty of the guilt of the defendant of the particular charge that you are considering—that is, to a certainty that convinces and directs the understanding and satisfies the reason and judgment of those who are bound to act conscientiously upon it. You should not go beyond the evidence to

hunt for doubts, nor entertain them from mere caprice or conjecture. They should arise, if at all, only from a fair, candid and impartial consideration of all the evidence in the case. This rule with reference to reasonable doubts must be observed and applied with intelligence. It is not intended to aid any person to escape who is in fact guilty of crime, but is a human provision of law, intended, so far as human agencies can, to guard against the danger of any innocent person being unjustly punished.

Second. The statute under which this action is brought reads as follows: "It shall be unlawful for any railroad company to carry any intoxicating liquor into this state, or from one point to another within the state, for the purpose of delivery, or to deliver the same to any person, company or corporation within the state, except for lawful purposes."

Third. And the question for you to determine under the information herein is whether or not the defendant company did carry any intoxicating liquor into the state of Kansas, as charged in the information, for the purpose of delivering the same to any persons, as named in the information, within the state of Kansas for any other than a lawful use thereof.

Fourth. The word "purpose" as used in this statute means "to intend to," and I instruct you that the railroad company has the right to carry within the state of Kansas intoxicating liquors for lawful purposes, and said railroad company can not be made responsible or liable for the acts of one of its consignees who received goods from it in actual transportation, after such goods had been delivered to the consignee, and if the consignee of intoxicating liquors complies with the provisions of the law by making and delivering a written statement, as required by the law, to the carrier before delivery, and such consignee should subsequently, upon receipt of intoxicating liquors so transported, use the same for unlawful purposes, the carrier thereof would not be liable therefor in a criminal action, unless at the time of such delivery he knew that the intoxicating liquors so delivered was intended to be used for unlawful purposes.

Fifth. Every one is presumed to obey the law and to do his just duty, and the defendant in this case is entitled to rely upon
58 such presumption, and nothing is to be inferred against it, or criminal responsibility attached to it, by reason of the conduct or concealed intentions of others, and if you find from the evidence in this case that the consignee in the shipments in question stated to the agent of the defendant company that the intoxicating liquors were for their own use, and signed and delivered a statement in writing to that effect to the agent of the defendant company, the said agent could rely upon such assurances, and making such assurances and giving such statement would not be evidence to the effect that the defendant company knew that such liquors were to be used for unlawful purposes, unless such agent knew at the time of receiving such statement that the same were not to be used for lawful purposes.

Sixth. You are further instructed that the general reputation of

the consignee named in the various counts in the information, in the community in which they reside, at the time such consignments were made and received as alleged in the information, and prior thereto, as being men engaged in the wholesale liquor business in the vicinity of Carona, Cherokee county, Kansas, in violation of the laws of the state of Kansas, the knowledge of such reputation by the agent of the defendant company is a circumstance which you may take into consideration in determining whether or not the defendant company had knowledge that the consignments of liquor were to be used in violation of the law; and you are further instructed that the knowledge of the agent of the defendant company is binding upon the company itself, and it must take notice of such knowledge.

Seventh. But you are further instructed that the mere fact that the consignee to whom was delivered the intoxicating liquors complained of herein had prior to said dates been engaged in the unlawful sale of intoxicating liquors within the state of Kansas, if it be a fact, is not any evidence that at the time he received such consignments or shipments that he had then any intent to violate any of the laws of the state of Kansas, and the defendant, its servants, agents and employees had the right to rely upon the assumption of the law that the consignee would not have such intent and did not intend to violate any of the laws of the state of Kansas.

Eighth. And you are further instructed that after hearing all the evidence and arguments of counsel, and after consideration of the case, and conference with their fellow jurors, if there is any one juror who is unable to say that the guilt of the defendant has been proven beyond a reasonable doubt, then, in that event, you can not convict the defendant.

You are instructed that if you find from all the evidence in the case that the defendant railway company did carry from without the state of Kansas to within the state of Kansas intoxicating
59 liquors for the purpose of delivering the same to either of the parties named in the information, for any other purpose than a lawful purpose, then you should find the defendant guilty upon so many counts of the information as you find such a state of facts exists in not exceeding twelve.

Before you can find the defendant guilty of either of the offenses with which it stands charged you must find and be satisfied from the evidence in this case beyond a reasonable doubt that it did in fact, in the county of Cherokee and state of Kansas, and within two years last past before the commencement of this prosecution, to wit, July 13, 1913, commit the crimes charged against it.

Candidly consider the evidence, free from passion and prejudice, fear or favor, and arrive at your verdict from all the evidence submitted to you, and from the law as the court has given it to you.

Designate one of your number as foreman, sign your verdict by him, and return into open court. If you find the defendant guilty, specify the offense and number thereof. If you find for the defendant your verdict will be a general one finding the defendant not guilty. Forms of verdicts in accordance with the instructions will be submitted to you.

60 Be it further remembered, that on April 12th, 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, the Abstract of the State upon its appeal, and on September 11th, 1915 the abstract of the record of the appellant, and on October 4th, 1915, the counter-abstract of the State (appellee) which constituted the record upon which this appeal was considered and determined, which abstracts and counter abstracts are in the words and figures as follows, to-wit:

61 And afterwards, on the 7th day of October, 1915, the same being one of the regular judicial days of the July Term, 1915, of the Supreme Court of the State of Kansas, before said Court in session at the Supreme Court room in the city of Topeka, the following proceeding, among others, was had and remains of record in the words and figures as follows, to-wit:

62 In the Supreme Court of the State of Kansas, Thursday, October 7, 1915.

No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
MO. PAC. R'L'Y CO., etc., Appellant.

Journal Entry of Submission.

This cause comes on to be heard on the notices of appeal, transcript of the judgment and abstract of the record from the district court of Cherokee county; and thereupon after oral argument by J. M. Challis for the appellant, and by S. M. Brewster, Attorney General, for the appellee, said cause is submitted on brief of counsel for both parties and taken under advisement by the court.

63 And also, on the 6th day of November, 1915, the same being one of the regular judicial days of the July Term, 1915, of the Supreme Court of the State of Kansas, before the said Court in session at the Supreme Court room in the City of Topeka, the following proceeding among others was had, and remains of record in the words and figures as follows, to-wit:

64 In the Supreme Court of the State of Kansas, Saturday, November 6, 1915.

No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
THE MO. PAC. R'L'Y CO., Appellant.

Journal Entry of Judgment.

This cause comes on for decision; and thereupon it is ordered and adjudged that the judgment of the court below as to the conviction under the first twelve counts be affirmed. It is further ordered and adjudged that as to the matters raised by the State in this appeal, judgment be reversed, and that this cause be remanded for further proceedings in harmony with the views of this court as expressed in its written opinion filed herein. It is further ordered that the appellant pay the costs of this case in this court taxed at $—, and hereof let execution issue.

65 Be it further remembered, that on the 6th day of November, 1915, there was filed in the office of the clerk of the supreme court of the state of Kansas, the court's written opinion, together with the syllabus thereto, which syllabus and opinion are in the words and figures, as follows, to-wit:

66 No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Appeal from Cherokee District Court.

Hon. Edward E. Sapp, Judge.

Affirmed in Part and Reversed in Part.

Syllabus by the Court.

WEST, *J.:*

1. The Webb-Kenyon Act, (37 Stat. at Large, 699) removing the interstate character and protection from intoxicating liquor shipped into a state for the purpose of use in violation of its laws is a valid exercise of the commerce power vested in Congress by the constitution.

2. In passing a bill by the Senate upon reconsideration after a veto it is not essential that two-thirds of all the senators vote therefor but it is sufficient if two-thirds of a quorum support such bill.

3. The act in question is not void as a delegation of power over interstate commerce but is a legitimate exercise of such power.

67 4. The constitution was not framed and adopted for the special protection of those who violate statutes but for the good of the entire citizenship and is to be construed with due regard for inevitable changes in social conditions and the advancement made in respect to the health, morals and welfare of the people.

5. The spirit of the constitution does not oppose but favors congressional action which makes for the promotion of obedience to the laws of the several states.

6. The Mahin Act, chapter 248, Laws of 1913, is not void as an attempt to regulate interstate commerce but, complementary to the Webb-Kenyon Act, is a valid enactment concerning the bringing into the state of intoxicating liquor for unlawful use here.

7. The title of the act is sufficient.

8. The Senate Journal does not affirmatively show that the bill was not read by sections on its final passage and the presumption is that the requirements of Section 15, article 2 of the constitution were observed.

9. The requirements concerning statements in writing to be made or taken and filed with the county clerk do not violate the provisions of the interstate commerce act as amended. (§§ 15-20.)

10. Provisions of the act relating to shipments within the state and the delivery of liquor to minors do not effect this prosecution and cannot be invoked for the purpose of building up the defense that the statute is unconstitutional.

11. The authority given the agent to refuse delivery of a shipment of intoxicating liquor when intended for unlawful use does not confer upon him judicial power.

68 12. Bringing into the state property to be used in violation of its laws is a legitimate subject of punitive legislation akin to that of bringing in stolen property.

13. The information in twelve counts charged the unlawful bringing of intoxicating liquor into the state, in twelve others its unlawful delivery here, and in the twenty-fifth both a bringing in and a delivery. Held, that each count charged an offense and it was error to exclude evidence under any of such counts.

14. The statements of the shipments made and filed by the carrier with the county clerk were competent evidence as were also the dockets of a justice of the peace showing pleas of guilty by such consignees to the charges of violating the prohibitory law.

15. Certified copies of records in the office of the United States Internal Revenue Collector for this district showing that from July 1912 to July 1913 the consignees held receipts for taxes paid as wholesale liquor dealers were competent and their exclusion was error.

16. The county attorney is entitled to have taxed as costs a fee of $25.00 on each count covered by the conviction and the direction to the clerk to omit such fee from the taxation of costs was error.

69 The opinion of the court was delivered by

WEST, *J.:*

The defendant was prosecuted for violating the Mahin liquor law, chapter 248, Laws of 1913.

The information contained twelve counts charging the unlawful bringing into the state of certain intoxicating liquor for the purpose of delivering it to one interested therein who intended to use it in violation of the prohibitory law, the defendant knowing such intention. The next twelve counts charged deliveries of such liquors to such persons for like purpose with like knowledge on the part of the defendant, and the twenty-fifth count charged both such bringing and delivery. The trial court sustained an objection to testimony under counts thirteen to twenty-five inclusive, from which ruling the state, having reserved a question, appeals. The defendant was convicted on the first twelve counts and from the judgment thereon appeals and assigns as grounds for reversal numerous reasons, each of which will now be considered.

The title chosen by the legislature is:

"An Act regulating the shipment of intoxicating liquor into the state or between points within the state, regulating the delivery of such liquor, providing for the filing of statements with the county clerk showing such shipments and providing for the fees of such county clerk for filing such statements, and prescribing penalties for the violation of the provisions of this act, and repealing all acts and parts of acts in conflict herewith."

It would have been amply sufficient and much more perspicuous to call it "An Act relating to the shipment of intoxicating liquor," for this is what the title means and all it means. Hence the contention that section 16, article 2 of the Constitution requiring

70 the subject of an act to be clearly expressed in the title was violated, is without merit.

(In re Division of Howard County, 15 Kan. 194;
In re Greer, 58 Kan. 268, 48 Pac. 950;
The State vs. Everhardy, 75 Kan., 851, 90 Pac. 276;
The State vs. Prather, 84 Kan. 169, 112 Pac. 829.)

Because the Senate Journal does not show that the bill was read by sections after amendment in the house, it is argued that the act is void by virtue of section 15 of article 2 of the constitution requiring that the reading of bills by sections on final passage shall in no case be dispensed with. But as the Senate Journal does not show that it was not thus read and is silent on that matter, the presumption is that the constitutional requirement was observed. (Weyand vs. Stover, Treasurer, 35 Kan. 545, p. 553, 11 Pac. 355.)

It is suggested that the act confers judicial power on agents to hear and decide the question of unlawful purpose on the part of the consignee. This is based on the provision of section 4 that if the agent taking the statement of the person to whom the liquor is delivered that it is for his own use, knows such statement to be false, he may refuse to deliver the liquor. This is simply a practical means

by which the agent may prevent liability himself and also hinder the consignee from making a spectacle of him by forcing upon him a statement palpably false. The agent acts as an individual and not as a judicial tribunal in taking the statement and is not by the section in question clothed with judicial power.

The act prohibits the delivery of liquor by a carrier to a minor and this is assigned as a ground of invalidity. But as no minor is involved in this transaction the defendant is not affected or harmed by this provision and under the familiar rule can not invoke it as a defense. (The State vs. Smiley, 65 Kan. 240, 69 Pac. 199 and cases cited. The State vs. Railway Co., 76 Kan. 467, p. 490, 92 Pac. 606.)

71 It is insisted that the criminality of the carrier can not be based on the unknown intention of the consignee to use the liquor unlawfully. But if the act be otherwise valid, no reason is apparent why the legislature may not punish the carrier who assists in violating the prohibitory law by knowingly bringing into the state for the purpose of delivery, or knowingly delivering liquor to one who intends to use it unlawfully. Knowledge and participation may well in law as in ethics render him particeps criminis with the guilty receiver.

The point is sought to be made that the evidence was insufficient to show knowledge, but it was such as to convince any fair minded person that a carrier who repeatedly delivers liquor in lots of from 10,000 to 30,000 pounds to known violators of the prohibitory law must be plethorically overstocked with ignorance not to know that such consignments are for other than the personal use of those receiving them. The jury reached the only possible sensible conclusion. This was approved by the trial court and there the matter must rest.

The statements of the shipments filed with the county clerk are said to have been incompetent evidence for the reason that they are required to be made by the carrier, and to use them against him is to make him a witness against himself. But he was not required to deliver or report such shipments if he had reason to believe they were intended for unlawful use, until he secured a written statement from the consignee that they were for his own use, and with this condition he can have no just complaint.

Dockets of justice courts showing violations of the law by the consignees were introduced and the defendant complains that pleas of guilty long prior to the deliveries in question do not prove or tend to prove that the persons entering such pleas intended to violate the Mahin Act after it should become a law. But together with the other evidence they were not only competent but significant and it was not error to receive them.

72 That the first twelve counts stated no offense because they charged only shipments into the state and not deliveries for unlawful purposes is also urged. As a matter of state legislation there is no reason why the unlawful bringing of liquor into the state cannot be constituted a crime as was the bringing in of stolen property long years ago. The argument that an interstate shipment includes delivery is of necessity without force if the shipment be not

interstate in character, and assuming for the moment that those here involved were not, each of the counts referred to stated an offense. The point that the title of the act mentions shipment only and not delivery, while the body of the act requires a statement to be taken only on delivery, loses sight of the fact that the statute is in the disjunctive—shipment or delivery—and of course a statement from the consignee could not be had until the shipment is delivered. The suggestion that the word "shipment" is used in the title in its generic sense and includes delivery, is correct, but this does not preclude division and separation into specific constituent offenses in the body of the act.

Counsel for the defendant by able and elaborate argument and brief have forcibly sought to maintain that the Mahin act is void as an attempt to regulate interstate commerce; that its interstate features cannot be separated from its state features so as to leave a valid statute, and that it plainly violates the interstate commerce act by requiring records of interstate shipments. It does unmistakably purport and undertake to make unlawful not only the delivery but the shipment into the state of a commodity heretofore held to be legitimate subject of interstate commerce whose shipment included its delivery after arrival here. Just as plainly and clearly does it require records of such shipments to be taken by the carrier and filed with the county clerk who is to permit their inspection by all persons so desiring. While, ordinarily, a common carrier may be compelled to accept and transport such a commodity in accordance with the required secrecy enjoined by the Federal Statute, this act not only relieves the carrier from liability for refusal
73 to accept and transport, but makes him criminally liable for handling a shipment when there is reasonable ground for believing that it contains intoxicating liquor, without requiring and receiving a statement from the consignee that it is intended for his own use, the falsity of which statement renders its maker liable to fine and imprisonment. It is apparent that this legislation marks a departure from any possible path formerly marked out by federal enactment and decision and unless changes have been made therein which warrant such departure, the attempt must of necessity fail as beyond the power of a state legislature.

It is needless from the standpoint of the defendant to inquire whether the local features can be so separated from the national features as to leave a valid enactment for the reason that the only counts on which conviction was had charged an unlawful transportation into the state. Section two requiring the carrier to file with the county clerk a statement in writing setting forth the date, name and address of the consignee, place of delivery and person to whom delivered, and the kind and amount of the liquor, and section four, that in case of reasonable doubt the carrier shall take from the consignee a written statement that the liquor is for his own use, and file such statement with the county clerk, together with the clause of section two that the county clerk shall permit all persons so desiring to inspect the statements just mentioned, are regarded by the defendant as in violation of amended sections 15 and 20 of the

interstate commerce act. (34 Stat. at Large 584; 36 Stat. at Large 539.) It is asserted that

"these records and accounts so to be kept under the Mahin act are applicable to both legitimate and illegitimate movements in interstate commerce,"

and that congress has fully acted (35 Stat. at Large, 1136, 1137) upon the subject by forbidding the delivery of liquor to any other person than the consignee unless upon his written order for
74 the collection of the purchase price thereof or the transportation of liquor unless labeled on the outside so as to show the name of the consignee and the nature and quantity of the contents. Also that this provision violates section 15 of the Interstate Commerce Act. The amendment of June 18, 1910, does provide that it shall be unlawful to disclose or permit to be acquired by any person or corporation other than the shipper or consignee without their consent, any information concerning the nature, kind, quantity, destination, consignee or routing of any property tendered or delivered for interstate shipment,

"which information may be used to the detriment or prejudice of such shipper or consignee or which may improperly disclose his business transactions to a competitor;"

except in obedience to certain process or under conditions set forth in the amendment. The provision of section 20, as amended, after requiring certain reports by common carriers and providing that the commission may prescribe the forms of any and all accounts, records and memoranda to be kept, specifies that

"it shall be unlawful for such carriers to keep any other accounts, records or memoranda than those prescribed or approved by the commission."

Section 9 of the Mahin act provides that,

"This act shall be construed in harmony with all Federal statutes relating to interstate commerce in intoxicating liquor."

75 Attention is called to an opinion by Mr. Justice Dawson when attorney-general of the state, advising county clerks that the provision requiring records is broader than the terms of section 15 of the interstate commerce act as amended and advising that the filed statements be preserved for the inspection of public officials charged with the duty of enforcing the law and the auditing officers of the carriers only. The exigency of the situation arising immediately upon the passage of the Mahin act presented many pressing questions concerning the operation thereof and this circular letter resulted from such examination and investigation as the limited time and manifold duties of the attorney-general permitted, and was an administrative interpretation to avoid threatened litigation. Having now had time for thorough investigation and consideration, and the advantage of the briefs and arguments of counsel we are impelled to the conclusion that the alleged conflict between these provisions of the Mahin act and interstate commerce law might

doubtless be a serious question were the commodity involved in this transaction still a legitimate subject of interstate commerce, but, as will presently appear, that it no longer retains that character.

We come now to the chief cornerstone of the defendant's argument—that the act is void because an attempt to regulate interstate commerce.

The validity of the Mahin act depends upon the constitutionality of the Webb-Kenyon act. (37 U. S. Stat. at Large 699.) Three grounds of the latter's invalidity are assigned: That it was not passed by a constitutional majority of the senate; that Congress cannot class intoxicating liquor with lottery tickets, diseased meat and other things intrinsically vicious or deleterious, and that the act is void as an attempted delegation of commerce power to the states. Of these in their order.

Section 7, article 1 of the Federal Constitution requires that a vetoed bill, after passage by the house in which it originated shall be sent to the other house

76 "by which it is likewise to be reconsidered, and if approved by two-thirds of that house, it shall become a law."

Section 3 provides that in case of impeachment no person shall be convicted "without the concurrence of two-thirds of the members present." The language of section 5 is that a majority of each house shall constitute a quorum to do business and that each house may determine the rules of its proceedings and shall keep a journal of its proceedings

"and the yeas and nays of the members of either house on any question shall, at the desire of one-fifth of those present, be entered on the journal."

United States vs. Weil, et al., 29 C. C. T. L. 523 and State of Minnesota vs. Gould, 31 Minn. 189, 17 Northwestern 276 are cited. In the Weil case this question was only incidental and while in the discussion of it the court referred to the similarity of language found in the New York Constitution adopted before the Federal Convention, it was also said (p. 539) touching the meaning of the two-thirds provision:

"What this decisive majority may be within the contention of the Constitution has been, and may again be, a matter of grave consideration."

"On the 7th July, 1856, the Senate of the United States decided, by a vote of 34 to 7, that two-thirds of a quorum only were requisite to pass a bill over the President's veto, and not two-thirds of the whole Senate. (Paschal, note 68.) And it is understood that this has been, and still is, the legislative construction of the words 'two-thirds of the House.'"

"The Constitution declares that 'a majority of each House shall constitute a quorum.' Therefore it will require only two-thirds of the majority of each House to enact a law, notwithstanding the objections of the President. * * * Here, however, it should be said that this construction of the two-third clause has never been brought to the test of judicial determination."

77 The Gould case is the only other authority cited in support of the view contended for. In Railway Co. vs. Simons, 75 Kan. 160, p. 139, 88 Pac. 551, in a specially concurring opinion by Mr. Justice Mason in which Mr. Justice Porter joined, it was said:

"Where a two-thirds vote (or other proportion) of a legislative body is prescribed as necessary for any purpose, two-thirds of those who are present and constitute a quorum is understood, unless special terms are employed clearly indicating a different intention. (Cooley's Const. Limit. 7th Ed., 201, note 2; Cotton Mills v. Commissioners, 108 N. C. 678, 13 S. E. 271; Green v. Weller et al., 32 Miss. 650; Warnock v. Lafayette, 4 La. Ann. 419.) This is the legislative construction placed upon the provision of the federal constitution that a bill shall become a law notwithstanding the president's veto, 'if approved by two-thirds of' each house. (U. S. Const., art. 1, §9. See The United States v. Alice Weil et al., 29 Ct. of Cl. 523, 539.) A contrary view is announced in State v. Gould, 31 Minn., 189, 17 N. W. 276."

It was further pointed out that when two-thirds of the entire membership must unite, such intention is usually indicated by a provision requiring two-thirds of all the members elected. Judge Cooley in his work on Constitutional Limit-s, 6th Edition, page 168, said:

"A simple majority of a quorum is sufficient, unless the constitution establishes some other rule; and where, by the constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended."

78 The State vs. McBride, 4 Missouri 305, is a well reasoned decision sustaining the position taken by Judge Cooley. See also United States vs. Ballin, 144 U. S. 1, p. 5. It must be held, therefore, in accordance with these authorities and the rule of the Senate itself that the act received the necessary support after the President's veto.

Next, as to the power of Congress to class intoxicating liquor as a commodity fraught with danger or damage and therefore to be excluded from interstate commerce, it is said that unlike statutes relating to lottery tickets, diseased meats and other articles which have been denied the privilege of interstate commerce, this act denies such privileges to intoxicating liquors only in certain local territory dependent entirely upon state legislation, thus leaving it recognized as a legitimate article of interstate commerce when shipped under certain conditions and circumstances and entirely illegitimate under other circumstances and conditions. It is argued that this amounts to a delegation to the legislatures of various states of power to control and therefore to regulate interstate commerce and that such delegation is not within the legislative province of congress. We do not regard the Webb-Kenyon Act as a delegation of congressional power. The contrary was expressly held in The State v. Brewing

Co., 92 Kan. 212, 139 Pac. 1169. Hence it is not necessary to enter upon a discussion of the validity of such an attempt had it been made, if indeed it should be claimed that such power can be delegated, no such claim being made in this case.

The title is

"An act divesting intoxicating liquors of their interstate character in certain cases."

The brief statute itself simply provides, for the purposes of this case,

"That the shipment or transportation in any manner or by any means whatsoever, of any * * * intoxicating liquor of any kind, from one state, into another state, which * * * intoxicating liquor is intended, by any person interested therein, to be received, possessed, sold, or in any manner used, either in the original package or otherwise, in violation of any law of such state,"

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shall be unlawful.

Congress has therefore undertaken to divest of its interstate character all intoxicating liquor shipped into a state to be used for an unlawful purpose—that is, for a purpose made unlawful by any law of such state. When the law of a given state makes it a crime to sell intoxicating liquor Congress intends that any liquor shipped in for the purpose of violating such statute shall be divested of its interstate character and that all the protection incident to such character shall be removed from it.

This brings us to the vital question on which hang all the law of the prophets of this conviction, namely: whether the power granted to Congress by the constitution to regulate interstate commerce includes the authority thus to divest a given commodity of its interstate character.

In considering this most important and farreaching problem it is one thing to regard its solution as a logical deduction to be drawn mechanically from the language of the constitution and another thing to account this a serious, deliberate attempt by the law making power of the Nation to obey the very spirit of the constitution itself framed for the professed purpose of insuring domestic tranquil-ity and promoting the general welfare. The citizen who, driving close to the brink, passes the danger line and finds himself in the wrecked condition brought about by transgressing the law, will search with eagerness for some solace and protection in the great fundamental charter whence the body which enacted the law derived its power. Under these circumstances the searcher asserts with vehemence the rights of the individual as against the assumed corrective power of the state itself, and the immortal blessings of personal liberty find no greater champions or more eloquent eulogists than those who are accused of violating statutes prescribed for the government of their conduct. It may be said, however, that constitutions are not framed and adopted for the special benefit of those who disregard or stretch to the breaking enactments intended for the enhancement of the public peace and welfare, but

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for the good of the citizenship at large, and the protection of higher things, the things of real value to humanity which make life worth living. Civil conditions can not remain stationary and unless they retrograde they must advance, and when the law making power of the nation, upon serious thought and careful deliberation, enacts a statute manifestly and unmistakably intended to promote the public health and morals and happiness it must be presumed, until the contrary be clearly shown, that it acted within its lawful province and power. Let us see, then, whether liquors shipped into a state for the purpose of violating its statutes can be divested of their interstate character in the exercise by Congress of its power to regulate interstate commerce.

That clear seeing statesman and publicist, James Bryce, upon remarking that someone had observed that the American Government and Constitution are based on the theology of Calvin and philosophy of Hobbs, said:

"This, at least, is true, that there is a hearty Puritanism in the view of human nature which pervades the instrument of 1787. It is the work of men who believed in original sin, and were resolved to leave open for transgressors no door which they could possibly shut." (The American Commonwealth, Vol. 1, p. 306.)

Dillon, in his lectures on Law and Jurisprudence, (p. 196) said that the absolutely unique feature of this Republic is its written constitutions whereby the people "by an act of unprecedented wisdom" have, in order to establish justice, to promote the general welfare and secure the blessings of liberty to themselves and their posterity, "protected themselves against themselves." Willoughby in his work on the Constitution, Vol. 1, Sec. 26, says:

"In construing the Constitution the very proper and indeed
81 absolutely necessary principle has been followed that that instrument was intended to endure for all time and that its grants of power are, therefore, to be interpreted as applicable to new conditions as they arise. By this is not meant, however, that these new conditions shall in any case justify the exercise of a power not granted, or create a limitation not imposed by the Constitution, but that the powers which are granted shall, if possible, be made applicable to these new conditions."

As said by a brilliant and well known member of the legal profession,

"* * * the constitution our fathers made had the marching quality in it; * * *"

"It has been supposed by some students of our national history that a written constitution is an inert mass of tabulated provisions. The supposition is not correct; for the national constitution, under the guidance of our great court of last resort, has grown and developed, not, perhaps like an unwritten one, but still keeping abreast with the demands of 'progressing history.' This does not mean that a written constitution grows by being violated whenever its provisions stand in the way of national progress; but it does mean that our constitution was, by the enlightened foresight of its framers, made to be an intelligent guide and chart, not a mere list of obstacles."

(George R. Peck, Reports of American Bar Association, 1900, Vol. 23, pages 256 and 275.)

"We now see the great end which they proposed to accomplish. It was to frame, for the consideration of their constituents, one federal and national constitution—a constitution that would produce the advantages of good, and prevent the inconveniences of bad government—a constitution, whose beneficence and energy would pervade the whole union, and bind and embrace the interests of every part, a constitution that would ensure peace, freedom, and
82 happiness, to the states and people of America." (Lecture of James Wilson, Vol. 1, p. 542.)

"Although Congress cannot authorize a state to legislate, it may adopt state legislation; it may divest designated articles of their interstate commerce character and subject them to the operation of state laws, * * *" (Sutherland's Notes on United States Constitution, p. 79).

"That the power to regulate includes the power to prohibit the interstate transportation of at least certain classes of commodities has been placed beyond question by the decision of the court in Champion v. Amee," (188 U. S. 321) (Willoughby on the Constitution, Vol. 2, Sec. 347).

A writer of great legal experience and ability in speaking of the power of Congress to regulate commerce, said:

"Having ascertained, then, what commerce is, and what are some of its elements, which may be the subject of the action of Congress, or of the attempted action of the States, we next come to consider what it is to "regulate" commerce. * * * Commerce being intercourse and traffic between people, to regulate it is to prescribe rules by which it shall be conducted." (Miller on the Constitution, p. 449.)

In Gloucester Ferry Co. v. Pennsylvania, 114 U. S. 196, Mr. Justice Field, in delivering the unanimous opinion of the court, said, (p. 203):

"Commerce among the States consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, and the navigation of public waters for that purpose, as well as the purchase, sale and exchange of commodities. The power to regulate that commerce, as well as commerce with foreign nations, vested in Congress, is the power to prescribe the rules by which it shall be governed, that is, the conditions upon which it shall be conducted: to determine when it shall be free and when subject to duties or other exactions. The power also em-
83 braces within its control all the instrumentalities by which that commerce may be carried on, and the means by which it may be aided and encouraged."

At page 215, the court quotes with approval from Judge Cooley, (Cooley's Constitutional Limitations, 732), to the effect that Congress may descend to the most minute directions of interstate commerce and may establish police regulations as well as the states, "confining their operations to the subjects over which it is given control by the Constitution;"

In United States v. Gettysburg Electric Ry. Co., 160 U. S. 668, the act of August 1, 1888,

"An Act to authorize condemnation of land for sites of public buildings and for other purposes,"

and a later act authorizing the expenditure of funds for the erection of monuments and tablets at Gettysburg, and a later joint resolution authorizing the secretary of war to purchase lands for that purpose, were under consideration, the important question being whether the use to which the land was to be put was one for which the Government could condemn land. Mr. Justice Peckham, in announcing the unanimous opinion of the court, said, (p. 429):

"In examining an act of congress, it has been frequently said that every intendment is in favor of its constitutionality. Such act is presumed to be valid unless its invalidity is plain and apparent. No presumption of invalidity can be indulged in. It must be shown clearly and unmistakably. This rule has been stated and followed by this court from the foundation of the government." (p. 429).

"Any act of congress which plainly and directly tends to enhance the respect and love of the citizen for the institutions of his country, and to quicken and strengthen his motives to defend them, and which is germane to, and intimately connected with, and appro-
84 priate to, the exercise of some one or all of the powers granted by congress, must be valid." (p. 429).

Again,

"Can it not erect the monuments provided for by these acts of congress, or even take possession of the field of battle, in the name and for the benefit of all the citizens of the country, for the present and for the future? Such a use seems necessarily not only a public use, but one so closely connected with the welfare of the republic itself as to be within the powers granted congress by the constitution for the purpose of protecting and preserving the whole country. * * * No narrow view of the character of this proposed use should be taken. Its national character and importance, we think, are plain. The power to condemn for this purpose need not be plainly and unmistakably deduced from any one of the particularly specified powers. Any number of those powers may be grouped together, and an inference from them all may be drawn that the power claimed has been conferred." (p. 430.)

While the beneficent purposes of the Webb-Kenyon Act are of an entirely different character from those thus eloquently reviewed, they touch as clearly and as deeply the welfare of the country by way of the protection of its manhood and womanhood, as those in the case referred to, for it is of as much national importance to make men sober as to make them patriotic. In the case of In Re Rahrer, 140 U. S. 545, holding constitutional the Wilson bill which removed from interstate shipments of liquor the former protection of the right of sale in the original package after reaching the state of importation, it was pointed out that the constitution does not provide that interstate commerce shall be free but by the commerce clause left it free except as restrained by congress. Reference was made to the language used in the License Cases, 5 Howard 599, to the effect

that if a commodity does not from its nature belong to commerce, or if its condition, from putrescence or other cause, be such that when it is about to enter the state it no longer belongs to
85 commerce or is not a commercial article, then the state may exclude its introduction. It was further declared that by the adoption of the constitution, the ability of the several states to follow their own will was extinguished and that of the general government substituted.

"But this furnishes no support to the position that Congress could not, in the exercise of the discretion reposed in it, concluding that the common interests did not require entire freedom in the traffic in ardent spirits, enact the law in question. In so doing Congress has not attempted to delegate the power to regulate commerce, or to exercise any power reserved to the States or to grant a power not possessed by the States, or to adopt state laws. It has taken its own course and made its own regulation, applying to these subjects of interstate commerce one common rule, whose uniformity is not affected by variations in state laws in dealing with such property.

"The power to regulate is solely in the general government, and it is an essential part of that regulation to prescribe the regular means for accomplishing the introduction and incorporation of articles into and with the mass of property in the country or State. 12 Wheat. 448.

"No reason is perceived why, if Congress chooses to provide that certain designated subjects of interstate commerce shall be governed by a rule which divests them of that character at an earlier period of time than would otherwise be the case, it is not within its competency to do so." (p. 561, 562.)

Again,

"Congress did not use terms of permission to the State to act, but simply removed an impediment to the enforcement of the state laws in respect to imported packages in their original condition,
86 created by the absence of a specific utterance on its part. It imparted no power to the State not then possessed, but allowed imported property to fall at once upon arrival within the local jurisdiction." (P. 564.)

This language seems almost prophetic of a further step than that of the Wilson bill which should ere long be taken by Congress in respect to the interstate character of intoxicating liquor. Before the enactment of the Wilson bill it was settled law that the state could not prohibit the sale within its borders of imported liquor in its original package for the reason that the interstate character was deemed to be retained until separated from such package. Congress, therefore, removed the interstate character to the extent thus indicated by the passage of the Wilson bill, and by the very terms of the Webb-Kenyon bill professes and assumes to remove the interstate character of liquor shipped into a state for the purpose of violating its laws. If one be within the constitutional grant of power to congress it is difficult in the extreme to see why the other is not likewise within such grant. In Delamater v. South Dakota, 205 U. S. 93, the statute making it a misdemeanor to take orders within

the state for the purchase of liquors was upheld as not in conflict with the exclusive power of congress over interstate commerce. Chief Justice White, in the opinion, after referring to the effect accomplished by the passage of the Wilson bill, said:

"The proposition relied upon, therefore, when considered in the light of the Wilson act, reduces itself to this: Albeit the State of South Dakota had power within its territory to prevent the sale of intoxicating liquors, even when shipped into that State from other States, yet South Dakota was wanting in authority to prevent or regulate the carrying on within its borders of the business of soliciting proposals for the purchase of liquors, because the proposals were to be consummated outside of the State, and the liquors to which they related were also outside the State. This, however, but comes to this, that the power existed to prevent sales of liquor, even when brought in from without the State, and yet there was no
87 authority to prevent or regulate the carrying on the accessory business of soliciting orders within the State. Aside, however, from the anomalous situation to which the proposition thus conduces, we think to maintain it would be repugnant to the plain spirit of the Wilson act. That act, as we have seen, manifested the conviction of Congress that control by the States over the traffic of dealing in liquor within their borders was of such importance that it was wise to adopt a special regulation of interstate commerce on the subject. When, then, for the carrying out of this purpose the regulation expressly provided that intoxicating liquors coming into a State should be as completely under the control of a State as if the liquor had been manufactured therein, it would be, we think, a disregard of the purposes of Congress to hold that the owner of intoxicating liquors in one State can, by virtue of the commerce clause, go himself or send his agent into such other State, there in defiance of the law of the State, to carry on the business of soliciting proposals for the purchase of intoxicating liquors." (p. 99.)

It has been decided that congress has power to prescribe that a package of any article which it subjects to tax and upon which it requires the affixing of a stamp shall contain only the article which is subject to tax. (Felsenheld vs. U. S., 186 U. S. 126.) In the Lottery Case, 188 U. S. 321, it was argued that the suppression of lotteries is not an exercise of any power committed to congress by the constitution; that the sending of lottery tickets or policy slips does not constitute or evidence any transaction belonging to interstate commerce and that

"A legislative fiat cannot make that a commercial commodity which in its essential nature is not such. A transaction which is not commercial in its nature, cannot become so merely by the declaration of congress."

But the conclusion reached was that lottery tickets are subjects of commerce and the regulation of their carriage from state to state is a regulation of interstate commerce. In response to the argument that the statute in question did not regulate but prohibited
88 the carrying of lottery tickets from one state to another, and that congress has no such power, it was replied that the

constitution does not define what is to be deemed a legitimate regulation and that it is to be determined when the question comes before the court whether congress, in prescribing a particular rule, has exceeded its power. That a large discretion is left to congress as to the means that may be employed in executing a given power, Then follows this query:

"Are we prepared to say that a provision which is, in effect, a prohibition of the carriage of such articles from State to State is not a fit or appropriate mode for the regulation of that particular kind of commerce? If lottery traffic, carried on through interstate commerce, is a matter of which Congress may take cognizance and over which its power may be exerted, can it be possible that it must tolerate the traffic, and simply regulate the manner in which it may be carried on? Or may not Congress, for the protection of the people of all the States, and under the power to regulate interstate commerce, devise such means, within the scope of the Constitution, and not prohibited by it, as will drive that traffic out of commerce among the States?" (p. 355.)

The answer reached by the court was:

"If the carrying of lottery tickets from one State to another be interstate commerce, and if Congress is of opinion that an effective regulation for the suppression of lotteries, carried on through such commerce, is to make it a criminal offence to cause lottery tickets to be carried from one State to another, we know of no authority in the courts to hold that the means thus devised are not appropriate and necessary to protect the country at large against a species of interstate commerce which, although in general use and somewhat favored in both national and state legislation in the early history of the country, has grown into disrepute and has become offensive to the entire people of the Nation. It is a kind of traffic which no one can be entitled to pursue as of right.

89 "That regulation may sometimes appropriately assume the form of prohibition is also illustrated by the case of diseased cattle, transported from one State to another. Such cattle may have, notwithstanding their condition, a value in money for some purposes, and yet it cannot be doubted that Congress, under its power to regulate commerce, may either provide for their being inspected before transportation begins, or, in its discretion, may prohibit their being transported from one State to another." (p. 358.)

In closing the opinion, Mr. Justice Harlan said:

"We decide nothing more in the present case than that lottery tickets are subjects of traffic among those who choose to sell or buy them; that the carriage of such tickets by independent carriers from one State to another is therefore interstate commerce; that under its power to regulate commerce among the several States, Congress—subject to the limitations imposed by the Constitution upon the exercise of the powers granted—has plenary authority over such commerce, and may prohibit the carriage of such tickets from State to State; and that legislation to that end, and of that character, is not inconsistent with any limitation or restriction imposed upon the exercise of the powers granted to Congress." (p. 363.)

In United States vs. Holliday, 3 Wall. 407, an act of congress making it an offense to sell liquor to an Indian under the charge of any superintendent or agent appointed by the United States was attacked as beyond the power of congress, but Mr. Justice Miller in the opinion, in response to the argument that so far as the act was intended to operate as a police regulation to enforce good morals within the limits of a state there was no warrant in the constitution for its exercise by congress, said:

"It relates to buying and selling and exchanging commodities, which is the essence of all commerce; and it regulates the intercourse between the citizens of the United States and those tribes, which is another branch of commerce, and a very important one."

90 After quoting from Chief Justice Marshall in Gibbons v. Ogden that the power to regulate commerce with foreign states does not stop at the jurisdictional limits of such states and that if congress has power to regulate it that power can be exercised wherever the subject exists; it was further soid:

"It follows from these propositions, which seem to be incontrovertible, that if commerce or traffic or intercourse is carried on with an Indian tribe or with a member of such tribe, it is subject to be regulated by congress although within the limits of a state."

It would hardly be doubted that under its power to regulate commerce with foreign nations congress could prohibit the importation of a given commodity into this country. If, then, the same power which would authorize prohibiting the importation of a given article into this country authorizes congress to prohibit its sale anywhere in the United States to an Indian while a ward of the government, it would seem to be abundantly sufficient to warrant the removal of the protection incident to its interstate character from an article or commodity transported into a state in order to violate the laws thereof. Indirectly, it is a mere recognition by congress of the evil necessarily flowing from a conflict between an increasing volume of state legislation and the protection heretofore accorded by federal authorities to intoxicating liquor regardless of the use and purpose for which it was carried from state to state. It is not perceived how this sort of recognition and comity on the part of the Nation can be subversive of constitutional liberty or constitutional principles. Neither is it logically inconsistent with plenary power to regulate the traffic in such commodity between the states, because it is now the settled doctrine of the federal courts that interstate commerce is a subject on which primarily congress alone may legislate and of which it alone has jurisdiction and concerning which the states may not assume to act except incidentally whether congress sees fit to act or not. The inevitable corollary to this doctrine is that congress possesses over this subject power so ample and so complete that

91 it may well remove from a commodity otherwise legitimate its interstate character and protection whenever its movement in interstate commerce is for the accomplishment of an unlawful purpose—the violation of the laws of one of the sister states of the Union. Those who contend for the invalidity of the act must base their reasoning on the slender platform that intoxicating liquor

when transported for the purpose of violating a state statute is by some subtle constitutional alchemy of the same national importance and entitled to the same governmental protection as if it were brought into the state for the most beneficient purpose imaginable. We deem this line of argument and the conclusion resulting therefrom opposed to the true doctrine of constitutional interpretation and to the spirit expressed by the framers of the constitution when the preamble was formulated.

On the appeal by the state the point is sought to be made by the defendant that a question cannot be reserved save upon an acquittal. But section 283 of the Criminal Code permits appeals to be taken by the state:

"Third, upon a question reserved by the state."

and under the decisions an acquittal is not a prerequisite.

(Junction City vs. Keefe, 40 Kan. 275, 19 Pac. 735;
The State vs. Rook, 61 Kan. 382, 59 Pac. 653;
The State vs. Bland, 91 Kan. 160.)

Counts twelve to twenty-four inclusive stated offenses and testimony thereunder should have been admitted.

The twenty-fifth count is attacked for duplicity because it charges both the bringing in and the delivery of intoxicating liquor. But in misdemeanors this is permissible.

(The State vs. Pryor, 53 Kan. 567, 37 Pac. 169;
The State vs. Meade, 56 Kan. 690, 44 Pac. 619;
The State vs. Taylor, 90 Kan. 440, 133 Pac. 861.)

92 The state offered to introduce in evidence certified copies of the records of the United States Internal Revenue collector showing that the consignee each held a receipt for taxes paid as wholesale malt liquor dealers. The offer was denied and the defendant contends that under the statute, section 4396, General Statutes of 1909, the evidence was incompetent because applicable only to prosecutions for maintaining a nuisance. This section makes the finding of intoxicating liquors on the premises, except in the case of a dwelling house, prima facie evidence that they are kept for sale or use in violation of law, and the finding of a stamp tax receipt prima facie evidence that the person to whom it was issued was at the time of such finding maintaining a common nuisance. This does not render such evidence incompetent for other purposes and in this case its only proper purpose was to show that the consignee had been engaged in the wholesale liquor business and for this purpose it should have been received.

(The State vs. Nippert, 74 Kan. 371, 88 Pac. 478;
The State vs. Dollar, 88 Kan. 346, 128 Pac. 365;
The City of Topeka vs. Briggs, 90 Kan. 843, 135 Pac. 1184.)

On a motion to retax costs the trial court directed the clerk not to tax as costs the $25.00 attorney fee on each count covered by the conviction. Section 4366 of General Statutes of 1909 provides that

upon notification or knowledge of any violation of any of the provisions of the laws of this state relating to intoxicating liquors, it shall be the duty of the prosecuting officer to inquire into the facts of such violation. If the testimony taken shall disclose that an offense has been committed it is the duty of the prosecuting officer to file complaint and proceed against the offender. Section 4377 provides that

93 "The county attorney shall be allowed a fee of $25.00 upon each count by which defendant shall be effected, and the same shall be taxed as costs in the case, but the county shall in no case be liable therefor."

The Mahin law is now one of "the provisions of the laws of this state relating to intoxicating liquors" and therefore the fee requirement of section 4377 applies.

(The State vs. Jepson, 76 Kan. 644, 92 Pac. 600;
The State vs. Poggmeyer, 91 Kan. 633, p. 635, 138 Pac. 593.)

The judgment is affirmed as to the conviction under the first twelve counts. As to the foregoing matters raised by the State on its appeal the judgment is reversed and the cause is remanded for further proceedings, in accordance herewith.

Dawson, J., not sitting, having been in counsel for the state.

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Dawson, J., not sitting, having been in counsel for the state.

[Endorsed:] No. 19984. The State of Kansas, Appellee, vs. The Mo. Pac. R'l'y Co., Appellant. Syllabus and Opinion. A—in part. R—in part. Filed Nov. 6, 1915. D. A. Valentine, Clerk Supreme Court.

95 In the Supreme Court of the State of Kansas.

STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Certificate to Transcript.

I, D. A. Valentine, clerk of the supreme court of the state of Kansas do hereby certify that the above and foregoing is a full, true correct and complete transcript of the record and proceedings, in the above entitled case and also of the opinion of the court rendered therein, as the same now appear of record and on file in my office.

In testimony whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, this 29th day of December, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of Kansas.

96 Here follows, the original petition for a writ of error, the writ of error and allowance thereof, the Citation with the service thereof, and a copy of the Bond for appeal.

97 In the Supreme Court of the State of Kansas.

No. 19984.

THE STATE OF KANSAS, Appellee,
vs.
THE MISSOURI PACIFIC RAILWAY COMPANY, Appellant.

Petition for Writ of Error. Assignment and Prayer.

Considering itself aggrieved by the final decision of the Supreme Court in rendering judgment against it in the above entitled case, the appellant, The Missouri Pacific Railway Company, hereby prays a writ of error from the said decision and judgment to the Supreme Court of the United States, and an order fixing the amount of bond for costs.

And the said Missouri Pacific Railway Company assigns the following errors in the records and proceedings of the said case:

The Supreme Court of Kansas erred in holding and deciding that Chapter 248, Session Laws of Kansas, 1913, was valid. The validity of said act was denied and drawn in question by the appellant on the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

And the Supreme Court of Kansas erred in holding and deciding

that the act of Congress, March 1st, 1913, known as the Webb-Kenyon Act, was valid. The validity of said act was denied and drawn in question by the appellant upon the ground of its being repugnant to the Constitution of the United States, and in contravention thereof.

The said errors are more particularly set forth as follows:

The Supreme Court of the State of Kansas erred in holding and deciding:

First. That said Chapter 248, Session Laws of Kansas, 1913, was not an act attempting to regulate interstate commerce, in contravention of and in conflict with the provisions of Section 8, Article 1, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign na-
98 tions, and among the several states and with the Indian Tribes.

Second That said Chapter 248, Session Laws of Kansas, 1913, was not violative of and in contravention to the provisions of Sections 15 and 20 of the Interstate Commerce Act of the Congress of the United States, as amended, wherein said Chapter 248, Session Laws of Kansas, 1913, required the keeping of accounts, records and memorandum, other than those prescribed or approved by the Interstate Commerce Commission, and permitting and requiring a disclosure by a common carrier, its officers, agents and employes, without the consent of the shipper or the consignee, information concerning the nature, kind, quantity, destination, consignee or routing of property tendered or delivered to such common carrier for interstate transportation.

Third. That said Act of March 1st, 1913, known as the Webb-Kenyon Act, was not an unwarranted and unconstitutional delegation by the Congress of the United States to the States, and each thereof, of the power to regulate interstate commerce, which power is solely reposed, by the provisions of Section 8, Article 1, of the Constitution of the United States, in the Congress of the United States.

Fourth. That said act of March 1st, 1913, known as the Webb-Kenyon Act, was passed in accordance with the requirements of Section 7, Article 1, of the Constitution of the United States, when the same, having been vetoed by the President of the United States and returned to the Senate of the United States for re-consideration, and there, upon such re-consideration, failed to receive the affirmative vote of two-thirds of the members of the Senate of the United States, as is required by said Section 7, Article 1, of the Constitution of the United States.

Fifth. That said Chapter 248, Session Laws of Kansas, 1913, was not violative of and in contravention to the provisions of Section 1 of the Fourteenth Amendment to the Constitution of the United States, and that it did not abridge the privileges and immunities of citizens of the United States, and deprive the appellant of its
99 property without due process of law, and deny to the appellant the equal protection of the law.

For which errors the appellant, The Missouri Pacific Railway Com-

pany, prays that the said judgment of the Supreme Court of the State of Kansas, dated November 6th, 1915, be reversed and judgment rendered in favor of the appellant company, and for costs.

W. P. WAGGENER,
J. M. CHALLISS,
Attorneys for The Missouri Pacific Railway Company.

STATE OF KANSAS,
Supreme Court, ss:

Let the writ of error issue upon the execution of a bond by The Missouri Pacific Railway Company to the State of Kansas, for costs, in the sum of $1,000.00; such bond, when approved, not to act as a supersedeas.

Dated December 13, 1915.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

100 *Writ of Error.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of Kansas, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Kansas and The Missouri Pacific Railway Company, a corporation, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the Constitution, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said The Missouri Pacific Railway Company, as by its complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at

Washington, within thirty days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done herein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

101 Witness the Honorable Edward Douglass White, Chief Justice of the United States, the 13th day of December, in the year of our Lord one thousand nine hundred and fifteen.

[Seal of District Court U. S., District of Kansas, 1861.]

MORTON ALBOUGH,
Clerk District Court United States,
District of Kansas.

Allowed:
W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

102 *Citation.*

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to the State of Kansas, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty days from the date hereof, pursuant to a writ of error filed in the office of the clerk of the Supreme Court of the State of Kansas, wherein The Missouri Pacific Railway Company is plaintiff in error, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in said writ of error mentioned should not be corrected, and why speedy justice should not be done the parties in that behalf.

Witness, the Chief Justice of the Supreme Court of the State of Kansas, this 13 day of December, 1915.

[Seal Supreme Court, State of Kansas.]

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

Attest:
D. A. VALENTINE,
Clerk Supreme Court of Kansas.

TOPEKA, KANSAS, November 13th, 1915.

I, attorney of record for the defendant in error in the above entitled case, hereby acknowledge due service of the above citation, and enter an appearance in the Supreme Court of the United States.

S. M. BREWSTER,
Attorney General of the State of Kansas.

Service of above citation acknowledged.

ARTHUR CAPPER,
Governor of the State of Kansas.

103 [Endorsed:] 19,984. Original Papers. Filed Dec. 13, 1915. D. A. Valentine, Clerk Sup. Ct.

104 In the Supreme Court of the United States.

THE MISSOURI PACIFIC RAILWAY COMPANY, Plaintiff in Error,
vs.
THE STATE OF KANSAS, Defendant in Error.

Bond.

Know all men by these presents, That we, The Missouri Pacific Railway Company, as principal, and W. J. Bailey, as surety are held and firmly bound unto the State of Kansas, in the sum of One Thousand ($1,000.00) Dollars, to be paid to the said State, to which payment, well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 6th day of December, 1915.

Whereas, the above named plaintiff in error seeks to prosecute its writ of error to the United States Supreme Court, to reverse the judgment rendered in the above entitled action by the Supreme Court of the State of Kansas,

Now therefore, The condition of this obligation is such, that if the above named plaintiff in error shall prosecute its said writ of error to effect, and answer all costs and damages that may be adjudged, if it shall fail to make good its pleas, then this obligation to be void, otherwise to remain in full force and effect.

THE MISSOURI PACIFIC RAILWAY COMPANY,
By W. P. WAGGENER,
Its General Attorney.
W. J. BAILEY, *Surety.*

105 STATE OF KANSAS,
Atchison County, ss:

I, W. J. Bailey, being duly sworn, on oath depose and say that I am of lawful age and a citizen of the State of Kansas, and know the contents of the foregoing instrument to which I have attached my name; and I further say that I am worth the sum of One Thousand Dollars over and above all debts, liabilities and exemptions.

W. J. BAILEY.

Subscribed aand sworn to before me this 6 day of December, 1915.
[SEAL.] R. V. WILCOX,
Notary Public.

My commission expires the 12 day of May 1917.

Bond approved, and not to operate as a supersedeas.

W. A. JOHNSTON,
Chief Justice Supreme Court of Kansas.

[Endorsed:] 19,984. State ex rel. v. Mo. Pac. Ry. Co. Bond for Appeal. Approved and filed Dec. 13, 1915. D. A. Valentine, Clerk.

106 SUPREME COURT, STATE OF KANSAS, *ss:*

I, D. A. Valentine, clerk of the said court, do hereby certify that there was lodged with me as clerk, on December 13th, 1915, in the matter of the State of Kansas, appellee, v. The Missouri Pacific R'l'y Co., appellant,

1. The original bond of which a copy *os* herein set forth.

2. Two copies of the writ of error, as herein set forth—one for the appellee and one to file in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said court at my office, in Topeka, Kansas, this 29th day of December, A. D. 1915.

[Seal Supreme Court, State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

107 UNITED STATES OF AMERICA,
Supreme Court of Kansas, ss:

In obedience to the commands of the within writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete records and proceedings in the within entitled case, together with all things concerning the same.

In Witness Whereof, I hereunto subscribe my name and affix the seal of the said Supreme Court of Kansas, in the city of Topeka, this 29th day of December, A. D. 1915.

[Seal Supreme Court State of Kansas.]

D. A. VALENTINE,
Clerk of the Supreme Court of the State of Kansas.

Endorsed on cover: File No. 25,082. Kansas Supreme Court. Term No. 799. The Missouri Pacific Railway Company, plaintiff in error, vs. The State of Kansas. Filed January 12th, 1916. File No. 25,082.

Supreme Court of the United States.

MISSOURI PACIFIC RAILWAY CO. vs. STATE OF KANSAS.	No. 799. October Term, 1918.

And now come Everett P. Wheeler and Eliot Tuckerman, Counsellors of this Honorable Court, and upon the record herein and the briefs already filed, move this Honorable Court, to grant them leave to file briefs in this cause, as *Amici Curiæ*, in support of the briefs filed by the plaintiff in error.

Washington, D. C., December 9, 1918.

EVERETT P. WHEELER,
ELIOT TUCKERMAN.

No. 25,082.

IN THE

Supreme Court of the United States,

OCTOBER TERM, 1914.

No. 799.

MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

STATE OF KANSAS,
Defendant in Error.

BRIEF FILED, BY PERMISSION OF THE COURT, IN THE PUBLIC INTEREST, BY EVERETT P. WHEELER AND ELIOT TUCKERMAN (AS AMICI CURIÆ).

The question of the interpretation of the Constitution of the United States, raised by the Plaintiff in Error in this Suit, presents an issue of

such paramount importance to all the people of this country, that the undersigned have asked and received leave to file this brief as *amici curiæ*, in the public interest.

The immediate question presented is whether the provisions of subdivision 2 of Section 7 of Article I of the Constitution of the United States, permitting the passage by the Congress of a Bill over the veto of the President, were complied with in the instance in question.

The Senate of the United States at the time in question had a potential membership of ninety-six, and an actual membership of ninety-five; there being one vacancy.

The Bill in question was vetoed by the President, and returned to the Senate, where, upon its reconsideration, sixty-three members voted in favor of its passage over the President's veto. Twenty-one Senators voted against its enactment, and eleven Senators failed to vote on the measure. That action lacked one vote, in order to comprise a favorable two-thirds vote of the potential membership of the Senate; or one-third of one vote, in order to comprise a favorable two-thirds vote of the actual membership of that body.

The Bill was presumably declared carried in accordance with the legislative precedent which has grown up in the Congress to the effect that each house is constituted as a "House", within the meaning of the Constitution, when a quorum of the membership is present; and that "two-thirds of that House", as mentioned in the

Constitution, signifies two-thirds of those voting on the measure.

Congressional Globe, July 7, 1856; pp. 1543–1550.
Hinds' Precedents: §§ 3537, 3538, note.

It is our contention that this precedent is at variance with the express words and the intention of the Constitution, and, therefore, does not represent the Supreme Law of the Land, as defined in subdivision 2 of Article VI of the Constitution.

We maintain that the "two-thirds" vote required to pass a bill over the President's veto means a vote equal in number to two-thirds of all the members of each House, at least of the actual membership, if not of the potential membership, of that house.

We therefore urge that the Bill in question, having failed to receive a favorable vote amounting to two-thirds of the actual membership of the Senate, as then constituted, failed of passage in that House over the President's veto, and never became a law.

The question of the interpretation of these words of the Constitution is now presented for the first time to this Court.

When the meaning of the clause in question was debated in the Senate, it was recognized, by both sides, that the question was ultimately judicial in character.

> "*Mr. Benjamin:* Then I will ask the Senator this further question—and I shall put no other—where is the power under this Gov-

ernment to determine who the two-thirds are?

Mr. Bayard: The judicial power.

Mr. Benjamin: The judicial power will determine it afterwards.

Mr. Bayard: The bill will not be a law unless it be passed according to the Constitution.

Mr. Benjamin: Undoubtedly it will not be a law, if it be not passed according to the Constitution, but for legislative purposes who is to decide this point?"

Cong. Globe, July 7, 1856, p. 1546.

The Legislative branch of the Government was not in a disinterested position in relation to the question, and, not unnaturally, they voted to increase rather than to diminish their power. The precedents of Congress on this subject are not, therefore, of any assistance to this Court.

We wish to emphasize the far-reaching effect the decision of the question as to the meaning of the words of the Constitution now before the Court for interpretation will have, by pointing to the fact that Article V of the Constitution, prescribing the method of its Amendment, contains similar wording.

The original draft of the Constitution was revised by a Committee on Style before its final adoption by the Convention; and its language is uniform and accurate, and has been considered a model of clear and simple English.

Similar words and phrases will therefore rea-

sonably be interpreted similarly in interpreting the instrument.

Clearly, no higher power can exist in a nation than the power to change its organic law. It was recognized that the power to amend the Constitution was necessary to preserve its healthy life. The Confederation, under which the framers of the Constitution were living, permitted of its amendment only by a unanimous vote of the States forming its membership. The same requirement for the Constitution was urged upon the Convention by Roger Sherman; at first generally (1), and later in regard to the internal police of the States and their equal suffrage in the Senate (2). The final form of Article V, providing for the proposal of amendments by "two-thirds of both Houses", and the ratification by three-fourths of the States, however, seemed sufficiently conservative to the framers of the Constitution and was, therefore, adopted.

This fifth Article of the Constitution has, however, fared in Congress, as has the clause now under consideration. Speaker Reed has ruled as follows on the subject:

> "Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds

(1) Madison's notes, Monday, Sept. 10, 1787, 2 Farrand: Records of the Federal Convention, 558.

(2) Madison's notes, Sept. 15, 1787, 2 Farrand: 629-631.

of those voting are sufficient in order to accomplish the object."

Hinds' Precedents, § 7027.

The same precedent exists in the Senate.

Hinds' Precedents, § 7028.

In other words, in the existing Senate, having a membership of 96, if 49 Senators are present and two-thirds of those approve a proposed amendment to the Constitution, the precedents of the Senate assume that the constitutional requirement of Article V is satisfied, so far as that House is concerned.

It seems to us clear, from the language of the Constitution itself, that no such result could have been contemplated by the framers of the instrument.

It is evident that the Congress was expected to be on duty, with full ranks.

In the House:

"When vacancies happen in the Representation from any State, the Executive Authority thereof *shall* issue Writs of Election to fill such Vacancies."

Art. 1, Sec. 2, Subd. 4.

In the Senate (before the XVII Amendment):

"if Vacancies happen by Resignation, or otherwise, during the Recess of the Legislature of any State, the Executive thereof may make temporary Appointments until the next meeting of the Legislature, which *shall* then fill such Vacancies."

Art. 1, Sec. 3, Subd. 2.

"a Majority of each (House) shall constitute a Quorum to do Business; but a smaller Number * * * may be authorized to *compel the Attendance of absent Members*, in such Manner, and under such Penalties as each House may provide."

Art. 1, Sec. 5, Subd. 1.

It thus seems clear that Congress was expected to be present or accounted for, and that on the matters of the highest importance, such as the passage of Bills or Resolutions over the veto of the President, or the proposition of Amendments to the Constitution, two-thirds of the whole number of members of each House was required.

Now, as to the requisite vote under the clause in question, to pass a bill over the President's veto.

The Constitution provides that if the President does not approve a bill "he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large in their Journal, and proceed to reconsider it, If after such Reconsideration *two thirds of that House* shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by *two thirds of that House*, it shall become a Law. But in all such Cases the Votes of both Houses shall be determined by Yeas and Nays, and the Names of the Persons voting for and against the Bill shall be entered on the Journal of each House respectively."

Art. I, Sec. 7, subd. 2.

Nothing is said about "two-thirds of those present" or "two-thirds of those voting"; but simply, "two-thirds of that House".

There are several provisions of the Constitution where the proportion of those present, or of those who vote, was intended to govern the result.

For example, when the Senate sits to try Impeachments, "no Person shall be convicted without the Concurrence of *two thirds of the Members present.*"

Art. I, Sec. 3, subd. 6.

"the Yeas and Nays of the Members of either House on any question shall, at the Desire of *one fifth of those Present*, be entered on the Journal."

Art. I, Sec. 5, subd. 3.

The President "shall have Power, by and with the Advice and Consent of the Senate, to make Treaties, provided *two-thirds of the Senators present concur.*"

Art. II, Sec. 2, subd. 2.

Moreover, the meaning of the words "two-thirds of that House" as used in the second subdivision of the seventh section of Article one is made doubly clear by the following (third) subdivision, governing Orders, Resolutions and Votes other than Bills. Such Orders, Resolutions and Votes may be repassed, if disapproved by the President, "by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill."

This was not a different requirement from the

requirement exacted in the instance of Bills. It was the same requirement, differently expressed. Yet it may be clearer to some minds that "two thirds of the Senate" does not mean two thirds of a quorum of the Senate, than that "two thirds of that House" does not mean two thirds of such quorum. If the Convention had meant by the words "two thirds of that House" two thirds of those present, the Committee on Style would have so expressed it, as they did in other instances.

In interpreting the Constitution, we may, in cases of doubtful meaning, have recourse to the records of the debates in the Convention.

Apparently the original resolution in the Constitutional Convention on the subject under discussion is thus recorded:

Journal, Monday, June 4, 1787.

"A question was then taken on the resolution submitted by Mr. Gerry, namely,

'resolved that the national executive shall have a right to negative any legislative act which shall not be afterwards passed unless by two third parts of each branch of the national legislature.'"

And on the question to agree to the same it passed in the affirmative (Ayes–8, Noes–2).

1 Farrand: Records of the Fed. Con. 94.

The same resolution came up again and again in the debates.

1 Farrand: 226, 230; 2 Farrand: 71, 132, 146; 160–162, 167, 181, 294–295, 298, 568, 582, 585.

Rufus King's notes for Wednesday, June 6, 1787, record "It will require as great Talents, Firmness & Abilities, to discharge the proper Duties of the Executive, as to interpose their veto, or negative which shall require 2/3 of both Branches to remove."

1 Farrand, 145.

Madison's notes state "10. Resold. that the natl. Executive shall have a right to negative any Legislative Act, which shall not be afterwards passed unless by two thirds of each branch of the National Legislature."

1 Farrand, 236.

Nothing that we have found in the debates or records gives us any intimation that the Convention had in mind less than the full membership of Each Branch of the Congress, when they mentioned it as a House, or that by "two-thirds of that House" they meant less than two-thirds of all its members.

We believe that the precedents which have grown up in Congress are not in accord with the terms or meaning of the Constitution and are not in accord with the best interests of the people.

The Court will not fail to note that Speaker Reed's ruling, and the other so called legislative precedents, all made under the influence of a purely legislative atmosphere, are merely statements and applications of the familiar legislative doctrine and practice that, for purposes of ordinary legislative business, a "quorum" is a "House".

Here, however, we are dealing with the Con-

stitution of the United States, which in terms specifies a "quorum" (Art. I, Sec. 5, first paragraph) or "those present" (Art. I, Sec. 3, subd. 6, and Sec. 5, subd. 3; and Art. II, Sec. 2, subd. 2) when it intends a "quorum" or those "present"; and with equal emplasis specifies a "House" when it intends a "House" as the description of the whole body or legislative branch in question. (Art. I, Sec. 7, subd. 2; Art. V, etc.)

Indeed the Constitution itself clearly defines these terms. (Art. I, Sec. 5.)

> "Each house shall be the judge of the elections, returns, and qualifications of its own members; and *a majority of each shall constitute a quorum* to do business".

This is a definition in the instrument itself that a "House", as such, means all the members of the house, or the sentence means nothing.

It cannot be said that we are confronted by a conclusive, practical construction heretofore placed upon these terms in the Constitution, because, in such a case, it is only the action of the *parties* to the instrument which can possibly create such a practical construction, and such action must have been taken in the light of full knowledge of the *facts*. Here, the "parties" to the instrument are the several *States* themselves. Just as they alone can amend the Constitution, so they alone can build up a practical and accepted construction, which may at times even amount to an amendment—as, for example, in the case of the practical working of the Electoral College provisions in the election of a president and vice president.

Historically speaking, it may be said that *no State, with the facts before it, has ever taken any action whatever bearing on this general question,* except the State of New York, in 1918, in the case of the Prohibition Amendment.

At the session of the Legislature of the State of New York for the year 1918, the Governor of the State communicated to the Senate and Assembly of the State a Joint Resolution of the Senate and House of Representatives of the United States of America in Congress assembled (two thirds of each House purporting to have concurred therein), proposing an Amendment to the Constitution of the United States.

New York Assembly Journal, Jany. 2, 1918.

The Legislature of the State of New York, thereafter passed a concurrent Resolution, requesting the respective Clerks of the Senate and House of Representatives of the United States to transmit to the Clerk of the Assembly, for the information of the Legislature of the State, duly certified copies of the Roll Calls of the Senate and of the House of Representatives, respectively, upon the passage of said Joint Resolution.

New York Assembly Journal, March 7, 1918.

Duly certified Roll Calls were transmitted to the Clerk of the Assembly in response to this Resolution.

New York Assembly Journal, March 11, 1918.

From these Roll calls it appears that the said proposed Amendment originated in the Senate of the United States, where it passed by a vote of 65 to 20. It was Amended in the House of Representatives, and, as amended, passed by a vote of 282 to 128. The amendments were concurred in by the Senate by a vote of 47 to 8.

The membership of the United States Senate was 96. The membership of the House of Representatives was 433.

Objection was raised in the New York Assembly to the consideration of the proposed Amendment, on the ground that the provision of Article V of the Constitution, that two thirds of both Houses shall deem it necessary, had not been complied with.

New York Assembly Journal, March 12, 1918.

This objection was defeated by a vote of 94 to 48.

New York Assembly Journal, March 12, 1918.

But the whole matter of the proposed Amendment was thereafter dropped.

New York Assembly Journal, March 19, 1918.

While it is understood that the question presented to the Assembly of the State of New York under Article V of the Constitution is not now before this Court; and that Article V may possibly receive a different interpretation from that given to the clause now under consideration, the word-

ing of the two clauses is similar, and the attention of the Court should be directed to the question arising under Article V, at this time.

We respectfully urge that the decision of the Court below in holding that the Bill in question was legally passed, was erroneous and should be reversed.

Respectfully submitted,

ELIOT TUCKERMAN,
EVERETT P. WHEELER,
(as *amici curiæ*.)

[B-4325]

INDEX.

No. 25082.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 799.

MISSOURI PACIFIC RAILWAY COMPANY,
Plaintiff in Error,

vs.

STATE OF KANSAS, Defendant in Error.

Brief of Plaintiff In Error.

STATEMENT OF THE CASE.

The Legislature of the State of Kansas, in 1913 passed an act concerning the shipment and delivery of intoxicating liquors, populorly known as the Mahin law, being Chapter 248, Session Laws of Kansas, 1913, which act and title is as follows:

"AN ACT regulating the shipment of intoxicating liquor into the state or between points within the state, regulating the delivery of such liquor, providing for the filing of statements with the county clerk showing such shipments and providing for the fees of such county clerk for filing such statements, and prescribing penalties for the violation of the provisions of this act, and repealing all acts and parts of acts in conflict herewith.

Be it enacted by the Legislature of the State of Kansas:

Section 1. It shall be unlawful for any railroad company, express company or other common carrier, or for any person, company or corporation to carry any intoxicating liquor into this state or from one point to another within the state for the purpose of delivery, or to deliver the same to any person, company or corporation within the state except for lawful purposes.

Section 2. It shall be the duty of any railroad company, express company or other common carrier or person who shall carry any intoxicating liquor into this state or from one point to another within the state for the purpose of delivery, and who shall deliver such intoxicating liquor to any person, company or corporation, to file with the county clerk of the county in which such intoxicating liquor is delivered a statement in writing setting forth the date on which such liquor was delivered, the name and post office address of the consigner and consignee, the place of delivery and to whom delivered, and the kind and amount of intoxicating liquor delivered, such statement to be filed within thirty days after the date of the delivery of such liquor.

Section 3. It shall be the duty of the county clerk to immediately file such statement as a part of the files of his office and to permit any and all persons so desiring to inspect the same at any time his office may be open.

Section 4. It shall be unlawful for any railroad company, express company, corporation or common carrier, or person, or any agent or employee of such railroad company, express company corporation or common carrier, or person to deliver any intoxicating liquor to any person other than the consignee, and in no

case, where there is reasonable grounds for believing that any consignment or package contains intoxicating liquor, shall any railroad company, express company, corporation or other common carrier, or the agent of such railroad company, express company, corporation or common carrier or person deliver such consignment or package without first having such consignee sign and deliver to the person to whose charge such consignment or package may be for delivery a written statement in substance as follows:

I hereby state that my name is .....; that my post office address is ....., Kansas; that I am more than twenty-one years of age, that I am the consignee to whom a package containing ..... of intoxicating liquor was consigned at ....., on ....., 19.., for my own use.

Signed and dated at ....., Kansas, this ..... day of ....., 19...

(Signature) .....
Consignee.

And in no case shall any railroad company, express company, corporation or other common carrier or person, or the agent of such railroad company, express company, corporation or other common carrier, or person, be liable for damages for not delivering such intoxicating liquor or package supposed to contain the same until such statement is executed and delivered as herein provided. And in no case shall any such railroad company, express company, corporation or other common carrier, person, or the agent of any such railroad company, express company, corporation or other common carrier, person, or the agent of such railroad company, express company, corporation or other common carrier, or person be held liable or subject to the penalties prescribed in this act for delivering such intoxicating liquor or package to the consignee when such statement is executed and delivered as herein provided, unless the party taking such statement knows the same to be false, in which case he may refuse to deliver such intoxicating liquor or package.

Section 5. Any person who shall make the state-

ment provided in section 4 of this act knowing the same to be false, shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than one hundred dollars or more than five hundred dollars and be imprisoned in the county jail not less than thirty days or more than ninety days.

Section 6. It shall be unlawful for any railroad company, express company, corporation or other common carrier or person, or the agent of such railroad company, express company, corporation or other common carrier or person to deliver any intoxicating liquor to any minor.

Section 7. It shall be unlawful for any person to ship any intoxicating liquor from any point within this state without marking on the outside of the package containing such intoxicating liquor where it can be plainly seen and read the words: 'This package contains intoxicating liquor.'

Section 8. Any railroad company, express company or corporation violating any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined in a sum not less than one hundred dollars or more than five hundred dollars; and any person violating any of the provisions of this act shall be deemed guilty of a misdemeanor and on conviction thereof shall be fined not less than one hundred dollars or more than five hundred dollars and be confined not less than thirty days or more than ninety days in county jail.

Section 9. This act shall be construed in harmony with all federal statutes relating to interstate commerce in intoxicating liquors, and all acts and parts of acts in conflict herewith are hereby repealed.

Section 10. This act shall take effect and be in force from and after its publication in the statute books of the state. Approved March 14, 1913."

The plaintiff in error was prosecuted in the District Court of Cherokee County, Kansas, for alleged violations of the above act, and was convicted upon twelve counts.

(Transcript of Record, p. 12.) Upon these convictions, judgment was imposed, consisting of a fine of $100.00 on each of the twelve counts, and for costs. (Transcript of Record, p. 16.) An appeal was taken from this judgment to the Supreme Court of the State of Kansas, and judgment was affirmed. (Transcript of Record, p. 44.)

Many questions were involved and raised in the lower court and in the Supreme Court of Knasas, which were of local and national importance, but the sole question for consideration in this matter which the plaintiff in error will present, is the claimed invalidity of the Mahin law, due to the fact that the Mahin law is an attempt on the part of the state to regulate commerce between the states, in violation of the Interstate Commerce clause to the Constitution of the United States. This claim of invalidity is based on the proposition that the legislature of the State of Kansas had no authority or jurisdiction to enact the Mahin law, under the constitution, and the sole source of its power to enact the Mahin law is found in the Webb-Kenyon Act (37 Stat. Large, 699), which is "An Act divesting intoxicating liquors of their interstate character in certain cases." The contention was heretofore and is here now made, that the Webb-Kenyon Act was and is invalid, unconstitutional and void, for that it was attempted to be passed by the Senate of the United States over the veto of the President, and it did not receive the requisite number of votes in the Senate of the United States, as required by the constitution, to achieve that result.

This question was raised:

A. By motion to set aside and quash the amended information. (Transcript of Record, p. 23.)

B. By answer. (Transcript of Record, p. 8.)

C. By objection to the introduction of testimony under the amended information. (Transcript of Record, p. 10.)

D. In the evidence by the introduction of Congressional Record. (Transcript of Record, p. 26.)

E. By instructions requesting a directed verdict for the defendant. (Transcript of Record, p. 32.)

F. By motion for new trial on all applicable statutory grounds. (Transcript of Record, p. 35.)

G. By assignment of error, brief and argument in the Supreme Court of Kansas. (Transcript of Record, pp. 46-61.)

H. By assignment of error in this Court. (Transcript of Record, p. 62.)

SPECIFICATIONS OF ERROR.

The plaintiff in error alleges and states that the Supreme Court of the State of Kansas erred in holding and deciding:

I.

That Chapter 248, Session Laws of Kansas for 1913 was not an act attempting to regulate Interstate Commerce, in contravention of and in conflict with Section 8, Article I, of the Constitution of the United States, which provides that Congress shall have power to regulate commerce with foreign nations and among the several states and with the Indian tribes.

II.

That the Act of March 1st, 1913, known as the Webb-Kenyon Act (37 U. S. Stat. Large, 699) was passed in accordance with the requirements of Section 7, Article I, of the Constitution of the United States, when the same, having been vetoed by the President of the United States, and returned to the Senate of the United States for reconsideration, and thereupon after such reconsideration, failed to receive the affirmative vote of two-thirds of the members of the Senate of the United States, as is required by Section 7, Article I, of the Constitution of the United States.

ARGUMENT.

As is indicated by the Transcript of the Record and by the opinion of the court below, the plaintiff in error, at every available opportunity, presented for the consideration of the court the claimed invalidity of an Act of the legislature of the state of Kansas, popularly known as the Mahin Act, which is set out in full, supra. It is not our intention or purpose in this hearing to present the contentions we have heretofore made in this matter, that the Congress has no authority to delegate to the several states its exclusive jurisdiction over matters of Interstate Commerce, for recent decisions of this court have, to a certain extent, foreclosed that question. The Webb-Kenyon Act has been upheld, as not being violative of our organic law; however, the point we make in this matter has not, so far as our research has discovered been presented to or passed upon by this court. This point, in short is that local or state legislation regulating Interstate Commerce depends for its validity and effect upon the Webb-Kenyon Act, and if the Webb-Kenyon Act is invalid, of necessity all local legislation having the Webb-Kenyon Act as its foundation necessarily falls. It is a matter which has passed into history that the closing hours of President Taft's term of office were marked by two of the most conspicuous and courageous acts which marked his official career. One the veto of an appropriation measure, which carried a rider exempting certain selected individuals and classes from prosecution for a violation of our criminal laws, and the other the veto of the Webb-Kenyon Act as being an un-

warranted delegation of congressional power to the various states, and an abandonment and repudiation by Congress of duties imposed upon it by the constitution.

After the President had vetoed the Webb-Kenyon Act, the same was returned to the Senate, and it appears from the Congressional Record, Vol. 49, No. 72, comprising pages 4457 to 4465 (Transcript of Record, p. 27) that when a vote was had on the passage of the bill, notwithstanding the President's veto, that 63 Senators voted for the bill, 21 against it, and 11 failed to vote. From the record it appears that the Senate at this time consisted of 95 members, and in order to secure a two-thirds vote of the Senate as then constituted, would require tha 64 Senators should vote in the affirmative. We thus see that the Webb-Kenyon Act received one vote less than two-thirds of the Senate as then constituted, of 95 members, or one vote less than two-thirds of the Senate as it should have been constituted of 96 members. The question is thus presented, is a two-thirds vote of "that house" referred to in the Constitution as being necessary to pass a bill over the Presidential veto, tow-thirds of the body, two-thirds of all the representatives of all the states, or simply two-thirds of a bare working quorum.

The phraseology of the constitutional provision applicable is as follows:

> "If, after such reconsideration, two-thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be considered, and if approved by two-thirds of that house, it shall become a law."

It is our contention that by this constitutional provision two-thirds of "that house" means two-thirds of the Senate as then constituted, and not two-thirds of a bare majority or sufficient to do business. The veto power is an extraordinary power to be only constitutionaly and sparingly exercised. It is presumed that the President of the United States, by reason of his exalted office, and the care used in his selection, is a man of unusual capacity and attainments, and the placing of this extraordinary power in one individual must necessarily demonstrate that the framers of the constitution determined that his veto should challenge the attention of the members of the law-making body, and should call a halt in their proceedings and cause a full and careful consideration of the matter. While it was sufficient to provide that a majority of the members of the Senate should be sufficient to transact ordinary business, still when the extraordinary condition was presented of the chief magistrate calling a halt upon and disapproving the proceedings of the law-making body, in view of such exalted disapproval it would seem that it should require a considerably larger number of the members of the law-making body to enact such a condemned measure into law than was necessary for the transaction of ordinary business. So long as Congress and the President are in accord on any bill a bare majority was sufficient, but when the two independent and co-ordinate branches of our government, the executive and the legislative, unite their powers for the purpose of law-making, and unanimity and accord is impossible and the veto power of the executive in his law-making capacity is exercised, then the dignity of his position

and proper consideration of his extraordinary powers demands that congress before it is able to override his veto should do so by a vote largely in excess of that which is necessary to simply enact a bill into law with executive approval. So the framers of the constitution, when they provided for the passage of a bill over the veto of the President distinctly stated that such action should not be had unless the affirmative votes of two-thirds of that house, that is two-thirds of the members who compose the house. Had it been their intention and purpose to permit such veto to be disregarded by less than two-thirds vote of the entire house they would have said so. When a Senator or Representative is elected by the people he becomes a member of the House or of the Senate, as the case may be. He is accredited as such. He is not accredited to the majority of such body, or is he accredited to a constitutional quorum, but he is elected and qualified to either house of the Congress, and when the constitution refers to "that house" it does not refer to a majority of the members of that house, nor to a quorum which would be authorized to transact ordinary business.

It is a well-known historical fact that ten years before the constitutional convention assembled in Philadelphia, the people of the state of New York framed their first constitution in 1777. A portion of article three of which reads as follows:

> "and that *all bills which have passed* the Senate and Assembly *shall, before they become* laws, *be presented to the said* council for their revisal and consideration; and if, upon such revision and consideration, it should appear improper to the said council, or a majority of

them, that the said bill should become a law of this state, that they *return* the same, together *with their objections* thereto, in writing *to* the Senate, or *House* of Assembly (in whichsoever the same *shall have originated*), *who shall enter the objections* sent down by the council *at large in their minutes, and proceed to reconsider* the said bill. But, *if after such reconsideration, two-thirds of* the Senate or House of Assembly *shall,* notwithstanding said objections, *agree to pass the* same, it shall, *together with the objections, be sent to the other* branch of the Legislature, where it *shall* also be reconsidered, and *if approved by two-thirds* of the members present, *shall be a law.* And in order to prevent any unnecessary delays, be it further ordained, that *if any bill shall not be returned by the* council *within ten days after it shall have been presented, the same shall be a law, unless the* Legislature shall *by their adjournment,* render a *return* of the said bill within ten days impracticable, *in which case* the bill shall be returned on the first day of the meeting of the Legislature after the expiration of the said ten days. Constitution, New York, 1777, Art. III. (The italicized words in the above are used in the Constitution of the United States, *verbatim,* except where the plural has been changed to the singular.) Here, then, we find the constitution, clause by clause, word for word. (1) That every bill shall be subject to revision. (2) That 'before it becomes a law' it shall 'be presented' to the revising power. (3) That if not approved it shall be 'returned.' (4) That when returned there shall be sent with it the 'objections' there may be against it. (5) That it shall be returned to the house in which it 'originated.' (6) That the objections shall be entered at 'large' on the journal. (7) That the House 'shall proceed to reconsider' the bill. (8) That it shall require a 'two-thirds' vote to pass it. (9) That it shall then 'toether with the objections' be 'sent to the other' house. (10) That it shall there also be 'reconsidered.' (11) That if it be likewise 'approved by two-thirds' it 'shall be a law.' (12) That if not returned 'within ten days after it shall have been presented' it shall likewise 'be a law' 'unless' the legislature 'by their adjournment' prevent a return, in which case it shall not be a law. These twelve provisions

> *mutatis mutandis,* were transferred to the constitution, in *ipsissimis verbis.* The only material change which the convention made was in the two-thirds clause, from which they struck the words 'of the members present' and inserted in their stead 'of that house.'" U. S. vs. Weil, 29 Ct. Cl. 538.

Thus it will appear that the model upon which the Constitution of the United States was foundede provided that in case of the re-consideration of a bill over the veto of the council, Governor or President, that two-thirds of those present would be sufficient to over-ride the veto. This apparently was not agreeable to the framers of our constitution, and they struck out such objectionable provision and inserted that it would require two-thirds of the entire body as constituted, using the most apt language for that purpose when it described such body as "that house."

Further support is given to our position by reference to section five, article one, wherein it provided that convictions in impeachment shall not be had "without two-thirds of the members present." Had it been intended that a veto should have been disregarded by the same vote, the same language would have been used. And again, in article five, the hasty and ill-timed amendment to the constitution is guarded against by requiring two-thirds of both houses to propose such amendement. Had it been intended that the constitutional amendment be proposed by two-thirds of a majority of both houses appropriate language would have been used. And again, it is provided by section two, article two, of the constitution that the president shall have power to make treaties, provided "two-thirds of the senators concur." Had it been the intention of the framers of the

constitution that it required two-thirds of the entire Senate to concur, appropriate language to that end would have been used. It follows, therefore, that excepting in those instances in which a definite number is indicated by the constitution itself that the majority in the Senate or House shall constitute a quorum to do ordinary business, but in view of the specific requirement of the constitution that it requires two-thirds of both houses of Congress to pass a bill over the president's veto, it follows that this two-thirds means two-thirds of those individuals who make up that house and not two-thirds of the bare majority thereof. On February 28th, 1913, it would require, therefore, to pass a bill over the veto of the President of the United States 63 1-3 votes, such being two-thirds of 95, but inasmuch as fractional votes are are not recognized and are impossible, it would require 64 votes to pass the Webb-Keynon Act, and having received but 63 votes it is just as invalid and just as worthless as though it had received but one vote in the affirmative. The lack of two-thirds of one vote in insure its passage in just as vital to its validity as though it had never been proposed as a piece of legislation. We are sensible to the fact that the position we have taken in this matter has not met with the approval of the Senate itself, for, in an attempt, figuratively speaking, to lift itself by its own bootstraps on July 7th, 1856, it decided by a vote of 34 to 7 that two-thirds of a quorum only was requisite to pass a bill over the veto of the President, and not two-thirds of the whole Senate. That so-called legislative construction of this constitutional provision is hardly worthy of comment. We are also sensible of the fact that the Supreme Court of South Carolina, Missouri

and Wyoming have decided upon their local constitutions, and for reasons which appear to them to be sufficient, and possibly were such when local constitutions are taken into consideration, that analagous provisions therein permitted the legislators of their states to over-ride the gubernational veto by two-thirds of a business quorum. The matter received but slight attention in Missouri and Wyoming, and was given more consideration in South Calolina. The reasoning in the cases, however, does not appeal to us as logical or convincing and, at all events, the constitutions of those states were necessarily different from the Constitution of the United States, and do not bear upon their face the evident intention of the framers of such constitution with respect to the number of votes required under the circumstances under consideration.

The Supreme Court of Minnesota has given this subject careful consideration, and we submit that its decision is logical and consonant with reason. In the case of State of Minnesota, ex. rel. Eastland v. Gould, 31 Minn., 189; 17 N. W., 276, there was up for consideration the question as to what the two-thirds vote provided by the Minnesota Constitution meant. It seems that the Constitution of Minnesota provides if, upon reconsideration of the bill returned by the governor, "two-thirds of that house," in which it originated, agrees to pass it, it is to be sent to the other house, and if approved "by two-thirds" of that house, it shall become a law. The constitution also provides that a majority of each house shall constitute a quorum for the transaction of business.

The court says:

"These are the constitutional provisions that throw light directly upon the question in hand. They show: First, that while a majority of the members of each house constitute a quorum, no law, however important, can be passed without the votes of a majority in each branch of the Legislature, of all the members elected to that branch. This is the general rule of legislation prescribed by the constitution.

In the second place, it appears that there are certain particular subjects which are not left to the operation of this general rule. For this, but one sensible reason can possibly be assigned. Certainly those subjects could not have been singled out from the mass, because they were of less importance than those of ordinary legislation. * * * *

In conformity with a practice, which we believe to be of universal prevalence in this country, our constitution has, for reasons of acknowledged wisdom, conferred the veto power upon the executive. The enactment of a law over a veto is an extraordinary exercise of legislative power. It overrides the official disapproval of the proposed law, by one of the three grand departments of the government; a disapproval authorized by the constitution, and which (in the particular instance) it is presumably a constitutional duty of that department to express. * * * * * * * * * * * * *

From these and other obvious considerations, which we will not take time to specify, it is apparent that all this legislation requiring the sanction of a two-third vote, is of an extraordinary character, and hence it is reasonable to expect that if any distinction were to be made by the constitution between it and the ordinary legislation, it would be by surrounding it with extraordinary precaution, rather than the contrary.

We entertain no doubt, therefore, that it is the intent of the constitution that the passage of these extraordinary measures shall require a vote larger than a majority of each house, of all the members thereof. It follows that the two-thirds vote cannot be the mere two-thirds of a quorum, i. e., of a majority. Any such construction would lead to absurd consequences, and among others, the result that a bill could be passed after

a veto by a vote less than is required to pass it before a veto."

State of Minnesota, ex. rel. Eastland v. Gould, supra.

If we are right in this contention, and we believe we are, it follows that the Webb-Kenyon Bill which received but sixty-three votes, over the veto of the President, when reconsidered by the Senate, failed of passage, for sixty-three is not two-thirds of ninety-five, nor two-thirds of ninety-six, which was the number which should have composed the Senate, but apparently at the time some state was represented by but one Senator, rather than two.

In the construction of statutes and constitutions, a cardinal rule is to arrive at what was the intention of the framers of the constitution or law. Of course, if the language is clear, the language expresses that intention, but if any doubt is cast upon the language by ambiguity or conflicting constructions, the safest guide is to ascertain, if possible, what was said and done by the convention or legislature at the time of the adoption of the bill. If it is contended by the state that the words "that house" are ambiguous, then we have a right to appeal to the history of the adoption of the constitution for the purpose of ascertaining the general object of the proposed provision and evils sought to be remedied. (36 Cyc., 1138). When we do so, we find that the constitutional convention which met in 1787 was at first seriously divided in opinion as to whether the veto power should be conferred upon the chief executive or not. The matter was the subject of sharp debate, some contending for an absolute veto power, and others radically opposed thereto. Finally, a middle ground

was reached and resolution adopted that the veto power should be reposed in the President, subject, when exercised, to being annulled by a three-fourths, vote of each branch of the legislature. Thus the matter stood for a few days, and subsequently the three-fourths was changed by amendment to two-thirds. According to Madison, who kept a record of the proceedings in the convention, this subject was debated by several of the members of the convention, and we find that the contention we are making; i. e., that the words "that house" were understood by the convention, and so expressed on the floor as meaning the entire body whether they were present in person or no, and did not mean a bare majority or business quorum. Upon the debate as to whether the number should remain at three-fourths or two-thirds, Mr. Gouvenour Morris, as reported by Madison, stated as follows:

> "Considering the difference between the two proportions numerically, it amounts in one house to two members only; and in the other to not more than five ("which" stricken out), according to the numbers of which the legislature is at first to be composed. It is to the interest, moreover, of the distant states to prefer three-fourths, as they will be oftenest absent and need the interposing check of the president. The excess, rather than the deficiency of laws, was to be dreaded. The example of New York shows that two-thirds is not sufficient to answer the purpose." Documentary History of the Constitution of the United States, Vol. 3, pp. 721-2-3.

In the above we have a construction of the words "that house" made openly on the floor of the convention and acquiesced in by all present. The reference to the necessity of the more distant states shows that it was apparent

that the members of either house were to be counted whether present or absent. The mathematical computation made shows that there was some definite number upon which to base it. When Morris said that the numerical difference between three-fourths and two-thirds amounted in one house to two members only, he referred to the Senate, which would be composed of twenty-six members, and the difference between two-thirds and three-fourths of twenty-six is the difference between seventeen and one-third and nineteen and one-half, being two members and a fraction, whereas the difference between two-thirds and three-fourths of a bare majority or business quorum; i. e., fourteen, would be the difference between nine and one-third and ten and one-half, but one member.

And again when Gouvenour Morris stated that the difference between two-thirds and three-fourths amounted in the other house to not more than five, he had reference to the House of Representatives, which, by the constitution itself as first constituted (Art. 1, Sec. 2) consisted of 65 members. Two-thirds of 65 is 43 1/3 and three-fourths of 65 is 48¾, so that it is apparent that when the size of the vote necessary to override the presidential veto was under consideration in the constitutional convention, it was contemplated that the vote should be computed on the basis of the full membership of each house.

Madison in reporting the proceedings of the convention makes no comment whatsoever on the observations of Morris. No other member of the convention or the committee that had the matter in charge raised a dissenting voice to the construction of the phraseoloy of this section as given

by Morris. When we realize that the model upon which the constitution was framed was the New York constitution of 1777, and in the preparation of the very section under consideration, the provision of the New York constitution which required the vote of a certain percentage of those present was changed to the vote of two-thirds of that house, it is apparent that the framers of the constitution intended that whenever the extraordinary situation should arise, whereby the executive representing one of the three co-ordinate and independent branches of the government interposed his veto, that it should require two-thirds of the entire membership of each branch of the national legislature to override such veto. Certainly a piece of national legislation involving the rights, liability and property of all the people should require more serious consideration and a larger vote to enact the same over the Presidential veto than the simple impeachment of some member of Congress which could be done by a vote of two-thirds of the membership present.

It is further provided in the constitution, Article 2, Section 2, that the President may make treaties with the consent of two-thirds of the Senate present. A reduced vote is indicated in this instance, notwithstanding the solemn and binding character of business in hand, for the reason that there is uninimity of sentiment. The President concurs with the Senate and he is not interposing the extraordinary power of the veto.

In Article 5 of the constitution it is provided that proposed amendments to the constitution may be made by two-thirds of both houses. It is our contention that veto

power of the President and the proposal of amendments to the constitution are of such extraordinary importance as to require the indicated percentage of the votes of both houses as constituted, rather than a certain percentage of a mere business quorum.

Courts and judges who have occasion to pass upon the question under consideration have sought and apparently found solace in the words of Judge Cooley, who has stated in his Constitutional Limitations, 7th Edition, 201, note 2, that where a two-thirds vote or other proportion of a legislative body is prescribed as necessary for any purpose, two-thirds of those who are present and constitute a quorum is understood, unless special terms are employed clearly indicating a different intention. It is our contention that even though the statement of principal as made by Cooley is correct, that a reading of the entire constitution of the United States indictaes that when they used the words "that house" in Section 7, Article 1, relative the veto power of the President, it meant just what it said, and used a special term clearly indicating an intention not to mean a quorum, or not to mean those present. In other portions of the constitution which we have pointed out heretofore, a less number than an indicated proportion of the whole body were authorized to do certain things, but on account of the seriousness and the magnitude of the matter in hand, it was desirable to have the largest practicable number of representatives of the people act in the matter, and that intention was manifested by requiring a certain proportion of all the members of either house of Congress. It would have made it no stronger or clearer

if, in the section of the constitution under consideration, it had provided that the vote should be two-thirds of all the members of that house. That house is composed of all its members, and is not composed of a bare working majority. When Gouvenour Morris appealed to the constitutional convention for insertion of a three-fourths clause rather than a two-thirds clause in Section 7, Article 1, he voiced the sentiment of the framers of the constitution, when he stated that the more distant members of the Congress will be oftenest absent and need the interposing check of the President. Why would they need the interposing check of the President, if the Presidential veto could be overridden by a two-thirds of a quorum? It was the scheme of the framers that a bill could be passed by a majority of a quorum, but when vetoed by the President, a different situation was presented, and before such bill could be enacted into law, it required a markedly increased vote over that which had passed it in the first instance, and this increased vote was guaranteed by requiring that it should be given by two-thirds that house. That is, by two-thirds of all the members composing that house.

Should it be held in this matter that an act may be passed over the Presidential veto by two-thirds of a quorum, it is possible for a bill to become a law notwithstanding expressed executive disapproval by markedly less vote than it received upon its original passage. To illustrate, a session of the Senate of the United States can convene and legally transact business with 49 members present. It passes a bill unanimously with 49 affirmative votes. This bill is submitted to the President. For logical, patriotic

and well expressed reasons, the President vetoes the bill, passes it back to the Senate with his reasons in writing. These reasons are logical and convincing to a certain number of Senators, who see the error of their ways. Upon reconsideration, they change their vote; however, there are thirty-three Senators who are obdurate and they decline to recede from their position, and vote to pass the bill notwithstanding the Presidential veto. Under the construction contended for by the plaintiff in error, the bill would properly pass, notwithstanding the veto and would pass by a vote of 33 Senators, practically a third of the body as constituted, and markedly less than voted for the bill in the first instance.

To illustrate again, it was the intention of the framers of the constitution that every state in the Union should be equally represented in the Senate, and that every citizen of the various states should be equally represented in the house. This was brought about by delegating to the members of Congress the authority to represent the states and represent the citizens. It was contemplated that in the consideration of Federal legislation all states and all citizens should have a voice through their chosen representatives. The power of these states was to be felt, notwithstanding the fact that by illness, death or other causes the individual who happened to represent the state might be absent. Theoretically and in order to carry out the scheme of the federal government, it is necessary in contemplating the Congress to look upon that body as being constituted as the constitution directs, and in which body every state in the Union is equal and has an equal voice, notwithstand-

ing the physical absence of some of its chosen representatives. If all accredited members of the Senate were in attendance, there would be 96 per cent, and 49 of those present could pass a bill, with 47 voting against its passage. This bill could be returned by the President with his veto message and be considered in a session of the Senate when but 49 members were present, and the bill would become a law by the vote of 33 Senators, if the principal for which we are contending is not correct, and thus be enacted into legislation with less votes than it originally received upon its passage, notwithstanding the executive disapproval. Surely the framers of our constitution did not contemplate such an absurd situation.

The principal for which we are contending is not dangerous, revolutionary or artificial. It is one of the safeguards which the constitution contains as against hasty and ill-considered legislation. It galvanizes the extraordinary power which the President possesses, which is not strictly an executive function, into a power worthy of that high office. It is no hardship upon the people who are to be governed by representatives of their own choosing that it should require two-third of all their elected representatives to enact a provision into law which has received the considerate condemnation of their representative in the executive branch of the government. The powers of the Congress and the veto power of the President do not conflict. There can be no jealousy between them. Their limitations are marked, and it was not intended by the framers of the constitution when they imposed in their chief executive an extra-executive function that it should be

be pared down and nullified by judicial construction. Any interpretation of the constitution which permits two-thirds of a working quorum to override the Presidential veto renders that veto power in the hands of the President as weak and helpless a thing as editorial criticism in the morning paper.

Very recent legislation has shown the absolute necessity of investing in the executive head of our government large discretionary powers under the constitution. The constitution has been interpreted so that under its provisions the ordinary citizen who is selected by his fellow countrymen to fill the Presidential office possesses, by virtue of that office and the backing of his fellow citizens, power possessed by no living Monarch. The people by the adoption and retention of their constitution and by the enactment, approval and enthusiastic support of legislation under that constitution as exercised in the past and as expressed in the present have shown full confidence in their scheme of government, whereby these extraordinary powers are vested in one individual. It is not consonant with the intention of the framers of the constitution as expressed in that document nor with the acceptance of that intention by succeeding generations, nor by the temper of the people as expressed in recent legislation, that their chief executive should be belittled, hands tied and shorn of his high executive prerogative and his veto power nullified by judicial construction.

For all of the foregoing, we respectfully urge that the decision of the court below in holding that the Webb-Kenyon Bill was legally passed, notwithstanding it did not receive two-thirds of the vote of the Senate as then constituted, was erroneous and this action should be reversed.

Respectfully submitted,

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J. M. CHALLISS,

Attorneys for Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1914.

No. 799.

MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error,*

vs.

STATE OF KANSAS, *Defendant in Error.*

No. 25,082.

BRIEF OF DEFENDANT IN ERROR.

Plaintiff in error attacks the validity of the law known as the Mahin law, being chapter 248, Session Laws of Kansas, 1913, on the ground that the same is invalid because its validity depends upon the validity of the Webb-Kenyon act (37 Stats. Large, 699), and that the Webb-Kenyon act is invalid because, having been vetoed by the President of the United States, on reconsideration it failed to receive the affirmative votes of two-thirds of the members of the Senate of the United States, as required by section 7, article 1, of the constitution of the United States, and the only question presented in the brief is the question of what vote it takes to pass a bill over the veto of the President of the United States.

It is claimed that while the validity of the Webb-Kenyon law has been upheld by this court, the question involved in this appeal was not presented, and that the Supreme Court of the United States has never determined the question involved.

This question has of late received considerable discussion because of the fact that the prohibition amendment submitted by Congress for the consideration of the states did not receive a vote of two-thirds of the members of the Senate and of the House, and the discussion of the question in the legislature of New York has been printed in the Massachusetts Law Quarterly of May, 1918.

In the case of *The United States v. Alice Weil et al.*, 29 Court of Claims Reports, 523, the court, in discussing the meaning of the two-thirds provision of the federal constitution, says:

"What this decisive majority may be within the intent of the constitution has been, and may again be, a matter of grave consideration.

"On the 7th July, 1856, the Senate of the United States decided, by a vote of 34 to 7, that two-thirds of a quorum only were requisite to pass a bill over the President's veto, and not two-thirds of the whole Senate. And it is understood that this has been, and still is, the legislative construction of the words 'two-thirds of the House.'

"The constitution declares that 'a majority of each house shall constitute a quorum.' Therefore it will require only two-thirds of the majority of each house to enact a law, notwithstanding the objections of the President. How small a vote this is, how trivial an impediment to legislation the revisory power of the President really is, may be seen in a single illustration. The Senate of the United States now consists of 88 members, 45 of whom constitute a quorum, and 30, two-thirds of a quorum. If these 30 approve a bill which the President has not approved it can pass the Senate. And it is within the constitutional bounds of possibility that a bill may 'become a law,' notwithstanding the objections of the President, by the approval of a minority of each house, consisting of only one, or at most two, members in excess of 'one-third (of the members) of that house.'

"Here, however, it should be said that this construction of the two-third clause has never been brought to the test of judicial determination."

While this question was only incidental in the Weil case, it shows the construction put upon this provision of the constitu-

tion as early as 1856, and this construction has been followed ever since.

In Cooley's Constitutional Limitations, seventh edition, page 201, occurs this language:

"A simple majority of a quorum is sufficient, unless the constitution establishes some other rule; and where, by the constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended."

That this is the rule has been so well recognized that many of the state constitutions have required in express terms a vote of all members elected. Our own constitution provides that no bill shall be passed, except that it receive a majority of all the members elected, and the same provision is found in the constitutional provision for passing a bill over the veto of the governor.

In the case of *Cleveland Cotton Mills v. Commissioners of Cleveland County*, 108 N. C. 678, the court held:

"1. If an act is to be done by an indefinite body, the law, resolution or ordinance authorizing it to be done is valid if passed by a majority of those present at a legal meeting; and when the act creating a corporation is silent on the subject, a majority of the officers or persons authorized to act constitute the legal body, and a majority of the members of the legally constituted body can exercise the powers delegated to the municipality.

"3. The words 'majority of the members-elect,' or 'majority of the qualified voters,' are used in constitutions and laws to take the exercise of a particular power out of the general rule, and make the assent of a majority of the whole number necessary."

In the case of *Green v. Weller*, 32 Miss. 650, the court held:

"1. 'The rules which prevail in the construction of statutes apply generally to the construction of written constitutions.'

"6. The constitution of this state provides that a majority

of each house shall constitute a quorum to do business; and that each house shall judge of the qualification and election of its own members; each house may determine the rules of its own proceedings; shall keep a journal of its proceedings; vacancies in either house shall be filled by new elections; each house may punish for disorderly behavior in its presence; the doors of each house shall be opened; neither house shall, without the consent of the other, adjourn for more than three days; bills may originate in either house, shall be read in each house, and having passed both houses shall be signed, etc. From these and other provisions it is evident that the term house means one branch of the legislature as contradistinguished from the other, and that a majority of the entire members composing the body constitute, in legal contemplation, the house or branch of the legislature, and that this is the general sense in which it is used in the constitution; and therefore it must be taken in that sense in all cases wherever it is used in that instrument, unless there be something in the context which indicates a different meaning.

"7. There is nothing in the context of that clause of the constitution, which prescribes the mode in which it shall be altered or amended, which indicates that the framers of that instrument intended to use the terms 'house' and 'branch,' therein employed, in a different sense from the general signification applied to it in the constitution; nor is there anything in the subject matter from which such different signification can be inferred. On the contrary, the right to change or abolish the form of government under which they live, being inherent in a free people, and as the legislature can only propose amendments for their approval or rejection, the provision of the constitution in question should receive such construction as would secure the exercise of this right to the people, as free and untrammelled as possible; it is sufficient, therefore, if an act proposing an amendment to the constitution receive, on its several readings in each branch of the legislature, two-thirds of a quorum present and voting."

The court, in its majority opinion, after holding that the words "two-thirds of each branch of the legislature," as used

in the Mississippi constitution, meant two-thirds of a duly constituted quorum, uses the following language:

"This conclusion has been sanctioned and sustained by the recent action of the Senate of the United States, in reconsidering certain bills passed by Congress for internal improvement, and to which the President of the United States had interposed his veto. When these bills came up for reconsideration, upon the objections of the President to their becoming laws, the question arose whether a bill could be passed over the veto of the President by two-thirds of the members present of each house, or whether two-thirds of the whole number of members composing the body were requisite. After full debate, in which many of the ablest jurists of the Senate participated, it was decided by an almost unanimous vote of that body that it was only necessary in such case that the bill should be voted for by two-thirds of the members present, there being a quorum, in order to make it a law. And it was stated by learned senators, and conceded to be true, that upon an examination of the precedents in the early history of the federal government in relation to the votes by which bills were passed proposing amendments to the constitution of the United States, it appeared that, at the first session of the first Congress, sundry amendments were passed by both houses, to be submitted for ratification in the mode prescribed by the constitution, and that in both houses these proposed amendments were adopted by a vote of two-thirds of the members present, and not by two-thirds of the whole members composing the body.

"The authority of the Senate of the United States upon the construction of words in the federal constitution, identical with those employed in our constitution, composed as that body is, for the most part, of very learned lawyers, is certainly entitled to great consideration and respect. And especially when we consider that the amendments to the federal constitution referred to were passed by the votes of two-thirds of the members present only, many of whom were members of the convention which framed the constitution, then but recently formed, it tends strongly to show the true construction, intended by the framers of the constitution, to be given to the words 'two-thirds of the house,' and has an important bearing upon the same words in our constitution, which were doubtless taken

from that precedent. If the question were merely doubtful from the words and context of our constitution, such an authority and such a precedent might be safely followed."

The first ten amendments to the constitution of the United States were proposed to the legislatures of the several states by the first Congress on the 25th of September, 1789, and by the authority which I have just cited it appears that these ten amendments received only a two-thirds vote of the members present, and that many of these members were men who had participated in framing the constitution. The precedent then established, interpreting the section of the constitution which provides that Congress, whenever two-thirds of both houses shall deem it necessary, shall propose amendments to the constitution, has been followed ever since that time. The language of the constitution requiring a vote of two-thirds of both houses to pass a bill over the veto of the President is identical with the language of the constitution with reference to the proposal of amendments. If the Webb-Kenyon law is invalid because two-thirds of all the members elected to the Senate of the United States did not vote in favor of passing it after the President had vetoed it, then the first ten amendments to the constitution of the United States were improperly submitted, and the bill of rights falls.

In the case of *State v. McBride*, 4 Mo. 303, the court held:

"An amendment which is ratified by two-thirds of a quorum—that is two-thirds of a majority of all elected—is ratified by two-thirds of that house, within the meaning of the constitution."

In that decision the court says:

"The first objection of the defendant's counsel is that this amendment did not pass the senate by a majority of two-thirds of that house. The senate then consisted of twenty-four members, and it appears that seven voted against, and fifteen for it. The question to be solved is, What is the meaning of the word *house*, as used in the constitution; does it mean all members

elected, or does it mean any number sufficient to constitute a quorum?

"In the 17th section of the third article of the constitution the word house is mentioned as consisting of all the members elected. 'A majority of each house shall constitute a quorum to do business.' The word house is frequently used in the same article, as 'each house shall appoint its own officers,' etc.

" 'Neither house shall, without the consent of the other, adjourn for more than two days at any one time,' etc. To cite further instances would be useless. The word house, as used in the constitution, may, then, either be the whole number elected to that house or a majority of its members. The most common meaning of the word, then, being a number of members sufficient to constitute a quorum to do business, it is our opinion that fifteen members of the senate having voted for this amendment, and seven only against it, two being absent, it was passed by the required number of votes."

In the 5th volume of Hind's Precedents of the House of Representatives, p. 1009, par. 7027, it is said:

"The vote required on a joint resolution proposing an amendment to the constitution is two-thirds of those voting, a quorum being present, and not two-thirds of the entire membership."

On May 11, 1898, when the joint resolution proposing an amendment to the constitution providing for the election of senators of the United States was called up, the vote was taken and there were yeas 184, nays 11, and the speaker announced that the resolution was passed, two-thirds having voted in favor thereof, a member from Connecticut challenged the attention of the House to the provision of the constitution regarding the submission of amendments and made the point of order that under the constitution it required two-thirds of the entire membership and not two-thirds of a quorum.

The speaker, Mr. Thomas B. Reed, ruling upon this point of order, said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision of the constitution says 'two-thirds of both houses.' What constitutes

a house? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a house to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted, and two-thirds of those voting are sufficient in order to accomplish the object. It has nothing to do with the question of what states are present and represented, or what states are present and vote for it. It is the House of Representatives in this instance that votes and performs its part of the function. If the Senate does the same thing, then the matter is submitted to the states directly, and they pass upon it.

"The first Congress, I think, had about 65 members, and the first amendment that was proposed to the constitution was voted for by 37 members, obviously not two-thirds of the entire House. So the question seems to have been met right on the very threshold of our government and disposed of in that way."

Hind's Precedents of the House of Representatives, vol. 5, pp. 1009-1010.

This same question was also before the Senate in 1869, and after debate the Senate decided that the two-thirds required was two-thirds of the senators present, if a quorum, and the attention of the senators was called to the fact that the same question was raised before the war.

"On September 21, 1789 (first session, First Congress, Journal, pp. 115, 116), on a question of agreeing to Senate amendments on articles of amendment to the constitution proposed by the House, the House agreed to certain amendments and disagreed to others, 'two-thirds of the members present concurring on each vote.' "

Vol. 5, Hind's Precedents of the House of Representatives, p. 1010.

In support of the contention made by the plaintiff in error is cited the case of *State, ex rel. Eastland, v. Gould,* 31 Minn. 189, where the supreme court of that state holds:

"The 'two-thirds vote,' by which our constitution authorizes the legislature to establish new courts, is a vote in each house of two-thirds of all the members thereof."

The constitution of Minnesota, however, at the time of this decision, differed from the constitution of the United States in regard to the number of votes required to pass an act. There is no provision in the constitution of the United States requiring that a law must receive the vote of a majority of all the members elected to each branch of Congress.

While the constitution of Minnesota, at the time of the decision, was as follows:

"No law shall be passed unless voted for by a majority of all the members elected to each branch of the legislature and the vote entered upon each journal of each house,"

And the provision of that constitution in reference to constitutional amendments was as follows:

"Whenever two-thirds of the members elected to each branch of the legislature shall think it necessary to call a constitutional convention, they shall recommend," etc.,

The provision of the constitution under consideration in this case was the one which provided:

"The judicial power of the state shall be vested in a supreme court, district courts, courts of probate, justices of the peace and such other inferior courts to the supreme court as the legislature may from time to time establish by a two-thirds vote."

That the provision in the constitution of Minnesota providing that no law shall be passed unless voted for by a majority of all members elected to each branch of the legislature had a controlling influence on the opinion of the court is seen by the language of the court at pages 192 and 193 of the opinion, where the court says:

"In our judgment the substance of the whole matter is that, as respects the passing of laws, the constitution recognizes two

votes only—a majority vote and a two-thirds vote—the latter greater than the former; and as the former is a vote in each house of a majority of all the members thereof, so, by a natural, and, as it seems to us, an inevitable construction, the latter is a vote in each house of two-thirds of all the members thereof. . . . We have examined all the cases and other authorities claimed by counsel to be opposed to the conclusion at which we have arrived, but we think that none of the constitutions to which they relate required (as does ours) a majority vote of all members elect to pass a law. This is, in our opinion, a decisive distinction."

And this "decisive distinction" renders the decision of no persuasive force in the case at bar, because of a lack of a similar provision in the constitution of the United States.

The Thirty-ninth Congress submitted to the various states for their ratification the fourteenth amendment to the constitution, and this was submitted by a vote in the Senate of 33 for, 11 against, and 5 absent. At that time there were 36 states in the Union and it took 48 to constitute a two-thirds majority. If the contention of the plaintiff in error in this case is correct, then the fourteenth amendment to the constitution was improperly submitted to the states and must fall.

Often, when seeking to avoid the regulations imposed by state acts, the plaintiff in error in this case has hurriedly retreated behind the bulwark of the fourteenth amendment to the constitution and from there defied the authorities of the state. We are a little surprised that when called upon to choose between maintaining unimpaired this bulwark of liberty and the right to ship intoxicating liquors into Kansas, it has unhesitatingly chosen the latter.

We respectfully submit that the Webb-Kenyon law was properly passed and that the judgment of the supreme court of the state of Kansas should be affirmed.

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Attorneys for Defendant in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1914.

No. 14.

MISSOURI PACIFIC RAILWAY COMPANY, *Plaintiff in Error.*

vs.

STATE OF KANSAS, *Defendant in Error.*

BRIEF FOR DEFENDANT IN ERROR.

The question raised by the plaintiff in error in this case is whether it takes two-thirds of all the members elected to the House and Senate to pass a bill over the President's veto, or whether it takes only two-thirds of a quorum of each House.

ARTICLE 1, SECTION 7, OF THE CONSTITUTION, PROVIDES:

> "Every Bill which shall have passed the House of Representatives and the Senate, shall, before it becomes

a law, be presented to the President of the United States; If he approves he shall sign it, but if not he shall return it, with his Objections to that House in which it shall have originated, who shall enter the Objections at large on their Journal, and proceed to reconsider it. If after such reconsideration two-thirds of that House shall agree to pass the Bill, it shall be sent, together with the Objections, to the other House, by which it shall likewise be reconsidered, and if approved by two-thirds of that House, it shall become a Law."

THE CONSTITUTION DEFINES "QUORUM."

ARTICLE 1, SECTION 5, PROVIDES:

"Each House shall be the Judge of the Elections, Returns and Qualifications of its own members, and a majority of each shall constitute a Quorum to do business. * * * Each House may determine the rules of its proceedings."

THE HOUSE AND SENATE HAVE ADOPTED A RULE THAT TWO-THIRDS OF THE MEMBERS PRESENT, OF A QUORUM, IS SUFFICIENT TO PASS A BILL OVER THE PRESIDENT'S VETO.

Numerous rulings and precedents have been made by the House and Senate on this point.

In 1856 the Senate passed a resolution that the expression "two-thirds of that House" meant two-thirds of a quorum and this has been the rule which that body has since followed. (See Andrews Manual of the Constitution 76, Mason veto power 119.)

34th Cong., 1st sess.; J., pp. 418, 419), July 7, 1856.

There being 31 yeas and 12 nays on the passage of a bill, Mr. Mason raised the question whether it did not require an affirmative vote of two-thirds of the members composing the Senate to pass the bill over veto. The President *pro tempore* (Mr. Bright) decided that it required only an

affirmative vote of two-thirds of the Senators present. From this decision Mr. Mason appealed; decision sustained; yeas 34, nays 7. (See Cong. Globe, pp. 1544, 1550.)

36th Cong., 2d sess.; J., p. 383.

Mr. Trumbull raised a question of order whether the joint resolution being a proposition to amend the Constitution of the United States, it did not require an affirmative vote of two-thirds of the members composing the Senate to pass the same. The President decided that it required an affirmative vote of two-thirds of Senators present only. On appeal, the decision was sustained—yeas 33, nays 1. (See Cong. Globe, p. 1403.)

HINDS PRECEDENTS, SECTION 3538, says: "Again, on August 11, 1856, the bill of the House (H. R. 12) entitled, 'An act for continuing the improvement of the Des Moines Rapids, in the Mississippi River,' was passed over the President's veto by 130 yeas to 54 nays, two-thirds of those present."

The principle that two-thirds of those present are sufficient was established on March 3, 1845 (second session, Twenty-eighth Congress, Journal, p. 567; Globe, p. 396), when the House passed a Senate bill over a veto by a vote of yeas 127, nays 30, a yea vote considerably less than two-thirds of the entire membership. Mr. Speaker Jones declared "that the bill was passed by the constitutional majority of two-thirds." On July 7, 1856 (first session, Thirty-fourth Congress, Senate Journal, p. 419; Globe, pp. 1544-1550), President *pro tempore* Bright made in the Senate a formal ruling based on this House practice, and after learned debate was sustained on appeal, yeas 34, nays 7.

CONSTRUCTION ON "TWO-THIRDS OF HOUSE."

The question has been repeatedly raised as to what constitutes "two-thirds of that House" in passing a bill over the

President's veto and what constitutes "two-thirds of both Houses" in submitting amendments to the Federal Constitution. The same principle applies to both in determining whether it takes two-thirds of all of the members elected or two-thirds only of a quorum present and voting. Both precedent and reason are authority for claiming that it requires only two-thirds of a quorum present and voting to pass a bill over the President's veto.

John Randolph Tucker, in his work on the Constitution of the United States, Volume 1, at page 427, says:

> "A majority of the body constitutes a quorum, but what is a majority of the body? The Constitution declares that the House shall be composed of members chosen by the people of the several States, and the Senate of two Senators from each State, chosen by the legislature thereof. Does the majority, to constitute a quorum, mean a majority of all the representatives which the several States may be authorized to elect, or of all who have actually been elected? And as to all of those who have actually been elected, there may be some who have died or resigned or been expelled. Shall these be counted? The House of Representatives have by a series of decisions (as well as the Senate) settled that the House is composed of members who have been chosen as Representatives, and the Senate and Senators, who may therefore be present if they choose; all of these are to be counted as constituting the body, and a majority of these constitute a quorum."

The United States Supreme Court, in the case of United States vs. Ballin, 144 U. S., 1, decided:

> "The Constitution provides that 'a majority of each (House) shall constitute a quorum to do business.' Its capacity to transact business is then established, created by the mere presence of a majority, and does not depend upon the disposition or assent or action of any single

> member or fraction of the majority present. All that the Constitution requires is the presence of a majority, and when that majority are present the power of the House arises."

In all of the adjudicated cases whenever the word House or Senate or Legislature is referred to, it means the legislative body authorized and capable of performing legal acts. When the Constitution refers to "that House," it means the House or Senate as a legislative agency. The Constitution, itself, provides that a majority of the House and Senate shall constitute a quorum to do business. When a requirement is made that two-thirds of "that House" shall agree to the passage of a bill over the President's veto, it can mean but one thing, namely, two-thirds of the House as recognized by the Constitution to transact business. In other words, a quorum possesses all of the powers of a whole body.

IN THE ABSENCE OF A SPECIFIC REQUIREMENT THAT THE REQUIRED MAJORITY SHALL BE, OF ALL THE MEMBERS ELECTED, THE RULE IS THAT IT REQUIRES ONLY A MAJORITY OF A QUORUM.

There is no requirement in the Federal Constitution that it shall take two-thirds of all members elected. It only requires two-thirds of each House, a quorum being present.

Cooley, in his Treaties on the Constitutional Limitations, says:

> "A simple majority of a quorum is sufficient unless the Constitution establishes some other rule."
>
> "For the vote required in the passage of any particular law the reader is referred to the Constitution of his State. A simple majority of a quorum is sufficient, unless the Constitution establishes some other rule; and where, by the Constitution, a two-thirds or three-fourths vote is made essential to the passage of any particular class of bills, two-thirds or three-fourths

> of a quorum will be understood, unless the terms employed clearly indicate that this proportion of all the members, or of all those elected, is intended."

The Supreme Court of the United States, 144 United States (1), said:

> "In those States where the Constitution provides that a majority of all the members elected to either House it shall be necessary for the passage of any bill to have a majority of all elected, but the court specifically stated 'no such limitation is found in the Federal Constitution and therefore the general law of such bodies obtains.'"

The Supreme Court of Alabama, Warehouse vs. McIntosh (1), Ala. App., 407, says, with reference to a bill which required a vote of two-thirds of each House:

> "The requirement was complied with by favorable vote on the Act, of two-thirds of a quorum of each House."

In State vs. McBride, 4 Mo., 303, the Supreme Court of that State, with identically the present question before it, held:

> "An amendment which is ratified by two-thirds of a quorum, that is, two-thirds of a majority of all elected, is ratified by two-thirds of that House, within the meaning of the Constitution."

In Southworth vs. R. R., 2 Mich., 287, the Supreme Court of Michigan, in a case involving the construction of a constitutional provision requiring the "assent of at least two-thirds of each House" to pass an act of incorporation, held:

> "The word 'House' in Section 2, Article XII of the Constitution of 1835, means the members present doing

business, there being a quorum, and not a majority of all the members elected; and an act of incorporation passed by two-thirds of the members present, there being a quorum, is constitutional."

In Smith vs. Jennings, 67 S. C., 324, the court held:

> Article IV, Section 23, providing that 'two-thirds of that House' shall be required to pass a bill or joint resolution that has been unapproved or unsigned by the Governor, the expression means two-thirds of the members present in a lawfully constituted session, and not two-thirds of the total membership.

Continuing the court said:

> "A quorum * * * possesses the power of the whole body in all matters of business wherein the action of a larger proportion of the entire membership is not clearly and expressly required. So, ordinarily, when a quorum is present acting, the 'House' is present acting, in all its potentiality. When the Constitution speaks of 'two-thirds of that House' as the vote required * * * it means two-thirds of the House as then legally constituted and acting upon the matter."

In deciding the case in 144 U. S., page 1, the Supreme Court quoted with approval State vs. Deliessline, 1 McCord, L., page 52, the following:

> "According to the principle of all the cases referred to a quorum possesses all the power of a whole body."

A long list of legislative precedents might be cited that two-thirds of a quorum is all that is necessary to pass a bill over the President's veto. Many of these measures were enacted during the reconstruction period when partisan feeling was bitter and if there was any good reason for raising

the question that is now before the court it would have been pressed with vigor at that time. Opposing counsel can not point to any court decision sustaining the construction of the Federal provision for which he contends.

The Votes on Resolution Submitting Federal Amendments.

The Record votes in Congress on Resolution proposing Constitutional Amendment, show that Congress considers two-thirds of a quorum sufficient to comply with the requirement of the provision relating to a two-thirds vote "of both Houses" to submit Amendments to the Constitution. The vote on the submission of certain of these Amendments is as follows:

Amendment	Representation under census apportionment	Actual membership	Yeas	Nays	Full representation	Actual membership	Yeas	Nays
VI	65	59	37	14	26	22	...	...
XII	142	...	83	42	34	...	22	1
XIII	243	183	119	56	70	49	38	
XIV	243	184	128	37	72	49	33	1
2d vote	...	184	120	32	...	...	...	...
XV	243	223	140	37	74	66	35	1
2d vote	...	224	145	44	...	...	...	...

These and other amendments to the Constitution were submitted by Congress to the States by votes fewer in number than two-thirds of all the members elected. The provisions in the Constitution relating to the veto and to the submission of amendments are similar. One refers to "that House," the other refers to "both Houses." If it requires two-thirds of all the members elected in one case, by the same reasoning it will require the same number in the

other. It is unthinkable that a construction will be adopted which will destroy a substantial part of the Constitution.

Cases Cited by Plaintiff in Error.

Two cases are cited by plaintiff in error, but neither are convincing.

The case of United States vs. Alice Weil, 29 Court of Claims, Report 523, is not persuasive. The court admits, in discussing this point, which is only incidental in the case, that "it will require only two-thirds of a majority for each House to enact a law notwithstanding the objections of the President." The court in making comment on this part of the case assumes that the veto provision in the National Constitution was copied from a provision in the New York Constitution. Mr. Hamilton, in No. LXXIII of the Federalist, says, it was taken from the Constitution of Massachusetts. Regardless of the authorship of the original provision, it is clear that the Constitution, itself, fixes what is a quorum for doing business, and the words "of that House" can mean only what the Constitution declares them to mean, namely, a quorum of either branch of the Congress.

Plaintiff in error argues that the change in the original draft of the veto clause to the words "of that House," indicates that the framers of the Constitution intended to require two-thirds of all the members elected to override a Presidential veto. He quotes from Governor Morris to show that he had in mind a full membership of the Senate and House instead of a quorum. There are, at least, two good reasons why this reasoning is not correct. A casual reading of the Congressional Record shows that members of Congress always make estimates on a full vote of the House or Senate. Every Congressman has the right to be present and it is the only safe way in making calculations about votes on disputed measures before that body. The

legally constituted quorum to do business, speaks for the whole body, and absentees can not complain that they were not represented if a quorum is actually present and voting. The other reason is that the Record shows that the attention of the framers of the Constitution was called to this identical question, and they knew they were adopting a provision which required only two-thirds vote of a quorum. The committee of the whole reported that the National Executive shall have a right to negative any legislative acts which shall not be afterwards passed by two-thirds of each branch of the National Legislature. See pages 161-373 of the Journal. In this form the matter went to the Committee of Detail which reported a provision very much like the one in the Constitution, in which appears the expression "two-thirds of that House."

At this point in the debate Mr. Carroll made a very important suggestion. That when the two-thirds rule was established the quorum was not fixed. That had been done since, and as a quorum was not a majority it was different. See Journal, 535. The subject was considered by the Committee on Style and reported as found in the Constitution. See Journal, 702.

An eminent writer on the Constitution has said that the adoption of the quorum clause changed the meaning of the expression "two-thirds of that House."

Curtis on History of the Constitution, Volume 2, page 267 [note], says:

> "A question has been made whether it is competent for two-thirds of the members present in each House to pass a bill notwithstanding the President's objections or whether the Constitution means that it shall be passed by two-thirds of all the members of each branch of the Legislature. The history of the veto in the convention seems to settle the question. There was a change of

phraseology in the course of the proceedings on this subject which indicates very clearly a change of intention. The language employed on the resolutions in all the stages through which they passed was 'The National Executive shall have a right to negative any legislative act which shall not be afterwards passed by two-third parts of each branch of the National Legislature.' This was the form of expression contained in the resolutions sent to the Committee of Detail and if it had been incorporated into the Constitution, there could have been no question but that its meaning would have been that the bill must be afterwards passed by two-thirds of all the members to which each branch is constitutionally entitled. But the Committee of Detail changed the expression and employed one which has a technical meaning, that meaning being made technical by the Constitution itself. Before the committee came to carry out the resolution relating to the President's negative, they had occasion to define what should constitute a 'House' on each branch of the Legislature, and they did so by the provision that a majority of each House shall constitute a quorum to do business. This expression 'a House or each House' is several times employed in the Constitution with reference to the facilities and powers of the two chambers respectively and it always means, when so used, the constitutional quorum assembled for the transaction of business. The same expression was employed by the committee when they provided for the mode in which a bill once rejected by the President should be again brought before the legislative bodies. They directed it to be returned 'to that House in which it shall have originated,' that is to say, to a constitutional quorum, a majority of which passed it in the first instance, and they then provided, that if, 'two-thirds of the House shall agree to pass a bill, it shall be sent together with the objections, to the other House * * * if approved by two-thirds of that House, it shall become a law.' This change of phraseology taken in connection with the obvious meaning of the term 'House,' as used in the Constitution

when it speaks of a chamber competent to do business, shows the intention very clearly. It is a very different provision from what would have existed, if the phrase two-third parts of each branch of the National Legislature had been retained." (See Elliot, V. 349, 376, 378, 431, 536.)

"This view will be sustained by an examination of all the instances in which the votes of 'two-thirds' in either body are required. Thus, 'each House may determine the rules of its proceedings, punish its members for disorderly behavior, and, with the concurrence of two-thirds, expel a member.' (Art. I, Sec. 5.)

"The context of the same article defines what is to constitute a 'House,' and makes it clear that two-thirds of a 'House' may expel. That this was the intention is also clear from what took place in the convention. Mr. Madison objected to the provision as it stood on the report of the committee, by which a mere majority of a quorum was empowered to expel, and, on his motion, the words, 'with the concurrence of two-thirds' were inserted. (Elliot, V. 406, 407.) In like manner the 5th Article of the Constitution empowers Congress 'whenever two-thirds of both Houses shall deem it necessary' to propose amendments to the Constitution. The term 'House' is here used as synonymous with a quorum. * * *

"But it is to be remembered, that the Constitution makes a general provision as to what shall constitute a House for the transaction of business; that when it means that a particular function shall not be performed by such a house, or quorum, it establishes the exception by a particular provision, as when it requires two-thirds of all the States to be present in the House of Representatives on the choice of a President, and makes a majority of all the States necessary to a choice; and that whether the function of the Senate in approving treaties is or is not a part of the business which under the general provision is required to be done in a 'House' or quorum consisting of a majority of all the members; the Constitution, does not speak of this function as

being done by a 'House,' but it speaks of the advice and consent of the Senate 'to be given' by two-thirds of the Senators present. The use of the term 'present' was necessary, therefore, in this connection because no term had preceded it which would guide the construction to the conclusion intended; but in the other cases, the previous use of the term 'House,' defined to be a majority of all the members, determines the sense in which the term 'two-thirds' is to be understood and makes it, as I humbly conceive, two-thirds of a constitutional quorum."

The foregoing history of this veto clause makes it clear that the framers of the Constitution knew that the provision in question meant exactly what we claim, namely, that two-thirds of a quorum is sufficient to pass a bill over the President's veto.

MINNESOTA CASE.

The other case cited by plaintiff in error was decided under the peculiarly worded Constitution which required a two-thirds vote of all the members of the Legislature to pass the law in question. The court in deciding the case recognized the peculiarity of the Minnesota Constitution and said:

"We have examined all the cases and other authorities claimed by counsel to be opposed to the conclusion at which we have arrived, but we think that none of the constitutions to which they relate required (as does ours) a majority vote of all members elect to pass a law. This is, in our opinion, a decisive distinction."

This decision harmonizes with the principle laid down by Justice Cooley when he said that unless there was a specific provision in a Constitution, requiring the majority to be a majority of all the members elected, then it would be simply a majority of a quorum. This case simply corroborates the construction for which we contend.

We respectfully submit that this court should sustain the validity of the Webb-Kenyon Act and affirm the decision of the Supreme Court of the State of Kansas for the following reasons hereinbefore set forth.

The Constitution determines what shall be a quorum of each House of Congress to transact business.

The Constitution authorizes each House to determine the rules of its proceedings.

The House and Senate adopted a rule that two-thirds of the members present of a quorum is sufficient to pass a bill over the President's veto.

Congress and the courts have uniformly construed the law to be that two-thirds of a quorum is sufficient to pass a law over the President's veto.

The Webb-Kenyon law was, therefore, legally enacted.

From the beginning of the history of this country, Congress and the courts have recognized the validity of the procedure for which we contend. There is no such overmastering consideration which attaches to the liquor traffic to justify setting aside the settled procedure of more than one hundred years.

Public policy, sound logic and precedent require the affirmation of the lower court decision.

Respectfully submitted,

WAYNE B. WHEELER,

Of Counsel for Defendant in Error.

MISSOURI PACIFIC RAILWAY COMPANY *v.* STATE OF KANSAS.

ERROR TO THE SUPREME COURT OF THE STATE OF KANSAS.

No. 14. Submitted November 13, 1918.—Decided January 7, 1919.

The provision of the Constitution requiring a vote of two-thirds of each house to pass a bill over a veto (Art. I, § 7, cl. 2), means two-thirds of a quorum of each house (*i. e.*, of a majority of its members, Art. I, § 5), not two-thirds of all the members of the body. P. 280.

This conclusion results from the context, proceedings in the Convention, and the early and consistent practice of Congress, especially under the similar provision made for submitting constitutional amendments. It is further confirmed by the practice of the States before and since the adoption of the Constitution. *Id.*

Webb-Kenyon Liquor Act sustained.

96 Kansas, 609, affirmed.

THE case is stated in the opinion.

Mr. W. P. Waggener and *Mr. J. M. Challiss* for plaintiff in error:

In view of the nature of the veto power and the extraordinary importance which must be attached to the function of the President in exercising it, it may well be assumed that the framers of the Constitution meant that a veto should challenge the attention of the members of the Congress and bring about a full and careful reconsideration of the matter affected; and, on the face of it, it would

seem that a considerably larger proportion of the members should be required to reënact a measure when so condemned than the number needed for its original enactment in the ordinary way. Hence we find the Constitution distinctly stating that to pass the bill upon such reconsideration there shall be an affirmative vote of two-thirds of "that house," *i. e.*, two-thirds of the members who compose the house in which the action is being taken. Had any less majority been intended, the Constitution would have said so. A Senator or Representative, upon election, becomes a member of the Senate or House and is accredited as such. He is not accredited to the majority, or to a constitutional quorum; in referring to "that house," the Constitution must refer not to a majority of the members, or to a quorum authorized to transact ordinary business, but to the membership in its entirety.

This part of the Constitution was evidently modeled upon the New York Constitution of 1777 (see *United States* v. *Weil*, 29 Ct. Clms. 538), in every respect save that there it was provided expressly that two-thirds of the members present could override a veto. The failure to follow the New York precedent in this respect is significant of an intention to require two-thirds of the entire membership, as the words used in the Constitution naturally imply.

Compare § 3 of Art. I, which requires only "two-thirds of the members present" in impeachment cases, and § 2 of Art. II, empowering the President to make treaties "provided two-thirds of the Senators present concur." On the other hand, Art. V provides against hasty amendment of the Constitution by requiring a vote of two-thirds of both houses. A reduced vote is allowed for treaties, notwithstanding their solemn character, because in their enactment the President and the Senators are working together. But the overriding of a veto, and the proposal of amendments to the Constitution, are of such extraordinary importance as to require the larger vote. It would have

made the intention no stronger or clearer if two-thirds of all the members of the house had been specified in so many words.

The remarks made by Gouverneur Morris in the Convention, as reported by Madison (Documentary History of the Constitution of the United States, vol. 3, pp. 721–723), support our contention.

Should it be held that an act may be passed over the Presidential veto by two-thirds of a quorum, it is possible for a bill to become a law notwithstanding expressed executive disapproval by a markedly less vote than it received upon its original passage.

Mr. Jas. P. Coleman, *Mr. S. M. Brewster*, Attorney General of the State of Kansas, and *Mr. Wayne B. Wheeler* for defendant in error.

Mr. Everett P. Wheeler and *Mr. Eliot Tuckerman*, by leave of court, filed a brief as *amici curiæ*, in support of the construction rejected in this case. See *post*, p. 599.

Mr. Chief Justice White delivered the opinion of the court.

To avoid penalties sought to be imposed upon it for illegally carrying intoxicating liquors from another State into Kansas, the defendant railroad, plaintiff in error, asserted as follows: (1) That the state law was void as an attempt by the State to regulate commerce and thus usurp the authority alone possessed by Congress; (2) that if such result was sought to be avoided because of power seemingly conferred upon the State by the Act of Congress known as the Webb-Kenyon Law (Act of March 1, 1913, c. 90, 37 Stat. 699), such act was void for repugnancy to the Constitution of the United States because in excess of the power of Congress to regulate commerce and as a usurpation of rights reserved by the Constitution to the

States; (3) because, even if the Webb-Kenyon Law was held not to be repugnant to the Constitution for the reasons stated, nevertheless, that assumed law afforded no basis for the exertion of the state power in question, because it had never been enacted by Congress conformably to the Constitution, and therefore, in legal intendment, must be treated as non-existing.

It is conceded that the ruling of this court, sustaining the Webb-Kenyon Law as a valid exercise by Congress of its power to regulate commerce (*Clark Distilling Co.* v. *Western Maryland Ry. Co.*, 242 U. S. 311, 325), disposes of the first two contentions and leaves only the third for consideration. In fact, in argument it is admitted that such question alone is relied upon. The proposition is this: That as the provision of the Constitution exacting a two-thirds vote of each house to pass a bill over a veto means a two-thirds vote, not of a quorum of each house, but of all the members of the body, the Webb-Kenyon Act was never enacted into law, because after its veto by the President it received in the Senate only a two-thirds vote of the Senators present (a quorum), which was less than two-thirds of all the members elected to and entitled to sit in that body.

Granting the premise of fact as to what the face of the journal discloses, and assuming for the sake of the argument (*Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 143; *Rainey* v. *United States*, 232 U. S. 310, 317,) that the resulting question would be justiciable, we might adversely dispose of it by merely referring to the practice to the contrary which has prevailed from the beginning. In view, however, of the importance of the subject, and with the purpose not to leave unnoticed the grave misconceptions involved in the arguments by which the proposition relied upon is sought to be supported, we come briefly to dispose of the subject.

The proposition concerns clause 2 of § 7 of Article I of

the Constitution, providing that in case a bill passed by Congress is disapproved by the President—" . . . he shall return it, with his objections to that house in which it shall have originated, who shall enter the objections at large on their journal, and proceed to reconsider it. If after such reconsideration two thirds of that house shall agree to pass the bill, it shall be sent, together with the objections, to the other house, by which it shall likewise be reconsidered, and if approved by two thirds of that house, it shall become a law. . . ."

The extent of the vote exacted being certain, the question depends upon the significance of the words "that house;" that is, whether those words relate to the two houses by which the bill was passed and upon which full legislative power is conferred by the Constitution in case of the presence of a quorum, (a majority of the members of each house; § 5, Art. I); or whether they refer to a body which must be assumed to embrace, not a majority, but all its members, for the purpose of estimating the two-thirds vote required. As the context leaves no doubt that the provision was dealing with the two houses as organized and entitled to exert legislative power, it follows that to state the contention is to adversely dispose of it.

But, in addition, the erroneous assumption upon which the contention proceeds is plainly demonstrated by a consideration of the course of proceedings in the convention which framed the Constitution, since, as pointed out by Curtis (History of the Constitution, vol. 2, p. 267, note), it appears from those proceedings that the veto provision as originally offered was changed into the form in which it now stands after the adoption of the Article fixing the quorum of the two houses for the purpose of exerting legislative power and with the object of giving the power to override a veto to the bodies as thus organized. A further confirmation of this view is afforded by the fact that there is no indication in the constitutions and laws

of the several States existing before the Constitution of the United States was framed that it was deemed that the legislative body which had power to pass a bill over a veto was any other than the legislative body organized conformably to law for the purpose of enacting legislation, and hence that the majority fixed as necessary to override a veto was the required majority of the body in whom the power to legislate was lodged. Indeed, the absolute identity between the body having authority to pass legislation and the body having the power in case of a veto to override it, was clearly shown by the constitution of New York, [1777] since that constitution, in providing for the exercise of the right to veto by the council, directed that the objections to the bill be transmitted for reconsideration to the Senate or House in which it originated, "but if after such re-consideration, two thirds of the said senate or house of assembly, shall, notwithstanding the said objections, agree to pass the same, it shall . . . be sent to the other branch of the legislature, where it shall also be re-considered, and if approved by two thirds of the members present, shall be a law," thus identifying the bodies embraced by the words "senate" and "house" and definitely fixing the two-thirds majority required in each as two-thirds of the members present.

The identity between the provision of Article V of the Constitution, giving the power by a two-thirds vote to submit amendments, and the requirements we are considering as to the two-thirds vote necessary to override a veto, makes the practice as to the one applicable to the other.

At the first session of the first Congress in 1789, a consideration of the provision authorizing the submission of amendments necessarily arose in the submission by Congress of the first ten amendments to the Constitution embodying a bill of rights. They were all adopted and submitted by each house organized as a legislative body

pursuant to the Constitution, by less than the vote which would have been necessary had the constitutional provision been given the significance now attributed to it. Indeed, the resolutions by which the action of the two houses was recorded demonstrate that they were formulated with the purpose of refuting the contention now made. The Senate record was as follows:

"Resolved: That the Senate do concur in the resolve of the House of Representatives, on 'Articles to be proposed to the legislatures of the states, as amendments to the constitution of the United States,' with amendments; two-thirds of the Senators present concurring therein." 1st Cong., 1st sess., September 9, 1789, Senate Journal, 77.

And the course of action in the House and the record made in that body is shown by a message from the House to the Senate which was spread on the Senate Journal as follows:

"A message from the House of Representatives. Mr. Beckley, their clerk, brought up a resolve of the House of this date, to agree to the . . . amendments, proposed by the Senate, to 'Articles of amendment to be proposed to the legislatures of the several states, as amendments to the constitution of the United States,' . . . ; two-thirds of the members present concurring on each vote; . . . " 1st Cong., 1st sess., September 21, 1789, Senate Journal, 83.

When it is considered that the chairman of the committee in charge of the amendments for the House was Mr. Madison, and that both branches of Congress contained many members who had participated in the deliberations of the convention or in the proceedings which led to the ratification of the Constitution, and that the whole subject was necessarily vividly present in the minds of those who dealt with it, the convincing effect of the action cannot be overstated.

But this is not all, for the Journal of the Senate contains further evidence that the character of the two-thirds vote exacted by the Constitution (that is, two-thirds of a quorum) could not have been overlooked, since that Journal shows that at the very time the amendments just referred to were under consideration there were also pending other proposed amendments, dealing with the treaty and law-making power. Those concerning the treaty-making power provided that a two-thirds vote of all the members (instead of that proportion of a quorum) should be necessary to ratify a treaty dealing with enumerated subjects, and exacted even a larger proportionate vote of all the members in order to ratify a treaty dealing with other mentioned subjects; and those dealing with the law-making power required that a two-thirds (instead of a majority) vote of a quorum should be necessary to pass a law concerning specified subjects.

The construction which was thus given to the Constitution in dealing with a matter of such vast importance, and which was necessarily sanctioned by the States and all the people, has governed as to every amendment to the Constitution submitted from that day to this. This is not disputed and we need not stop to refer to the precedents demonstrating its accuracy. The settled rule, however, was so clearly and aptly stated by the Speaker, Mr. Reed, in the House, on the passage in 1898 of the amendment to the Constitution providing for the election of Senators by vote of the people, that we quote it. The ruling was made under these circumstances. When the vote was announced, yeas, 184, and nays, 11, in reply to an inquiry from the floor as to whether such vote was a compliance with the two-thirds rule fixed by the Constitution, as it did not constitute a two-thirds vote of all the members elected, the Speaker said:

"The question is one that has been so often decided that it seems hardly necessary to dwell upon it. The provision

of the Constitution says 'two-thirds of both Houses.' What constitutes a House? A quorum of the membership, a majority, one-half and one more. That is all that is necessary to constitute a House to do all the business that comes before the House. Among the business that comes before the House is the reconsideration of a bill which has been vetoed by the President; another is a proposed amendment to the Constitution; and the practice is uniform in both cases that if a quorum of the House is present the House is constituted and two-thirds of those voting are sufficient in order to accomplish the object. . . . " Hinds' Precedents of the House of Representatives, vol. 5, pp. 1009–1010.

This occurrence demonstrates that there is no ground for saying that the adherence to the practice settled in both houses in 1789 resulted from a mere blind application of an existing rule; a conclusion which is also clearly manifested, as to the Senate, by proceedings in that body in 1861 where, on the passage of a pending amendment to the Constitution, as the result of an inquiry made by Mr. Trumbull relative to the vote required to pass it, it was determined by the Senate by a vote of 33 to 1 that two-thirds of a quorum only was essential. 36th Cong., 2nd sess., March 2, 1861, Senate Journal, 383.

In consequence of the identity in principle between the rule applicable to amendments to the Constitution and that controlling in passing a bill over a veto, the rule of two-thirds of a quorum has been universally applied as to the two-thirds vote essential to pass a bill over a veto. In passing from the subject, however, we again direct attention to the fact that in both cases the continued application of the rule was the result of no mere formal following of what had gone before but came from conviction expressed, after deliberation, as to its correctness by many illustrious men.

While there is no decision of this court covering the sub-

ject, in the state courts of last resort the question has arisen and been passed upon, resulting in every case in the recognition of the principle, that in the absence of an express command to the contrary the two-thirds vote of the house required to pass a bill over a veto is the two-thirds of a quorum of the body as empowered to perform other legislative duties. *Farmers Union Warehouse Co.* v. *McIntoch*, 1 Ala. App. 407; *State* v. *McBride*, 4 Missouri, 303; *Southworth* v. *Palmyra & Jackson R. R. Co.*, 2 Michigan, 287; *Smith* v. *Jennings*, 67 S. Car. 324; *Green* v. *Weller*, 32 Mississippi, 650. We say that the decisions have been without difference, for the insistence that the ruling in *Minnesota ex rel. Eastland* v. *Gould*, 31 Minnesota, 189, is to the contrary, is a wholly mistaken one, since the decision in that case was that as the state constitution required a vote of the majority of all the members elected to the house to pass a law, the two-thirds vote necessary to override a veto was a two-thirds vote of the same body.

Any further consideration of the subject is unnecessary, and our order must be, and is

Judgment affirmed.